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No. 87-

In The

Supreme Court of the United States

October Term, 1987

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EDWIN T. SHIMODA, *Administrator, Oahu Community Correctional Center, and* MICHAEL KAKESAKO, *Corrections Division Administrator,*

Petitioners,

v.

EMMET AKAO, ALLEN V. TRIPP, AND GARRICK UMIAMAKA,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

WARREN PRICE, III
Attorney General
State of Hawaii

CORINNE K.A. WATANABE*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the judgment of the court of appeals, which on the basis of "intervening" law of the circuit, handed down after judgment was entered for petitioners in the district court, permits respondent inmates to litigate monetary claims for alleged Eighth Amendment violations occasioned by asserted prison overcrowding, conflicts with this Court's decision in *Anderson v. Creighton*, 107 S. Ct. 3034 (1987), or, if it does not so conflict, breaches the limits of the Eleventh Amendment?

2. Whether the court of appeals erred in foreclosing petitioners even from presenting evidence to substantiate their claim that a 1985 federal consent decree settling litigation of prison overcrowding charges, including all claims "applicable to more than the individual circumstances of a particular plaintiff class member," and which reflected an explicit agreement by respondents that the conditions complained of could remain unchanged until December 15, 1987, mooted the instant controversy and barred respondents, members of the plaintiff class, from pursuing monetary relief to redress the instant Eighth Amendment claims?*

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* Petitioners in this Court include Edwin T. Shimoda, who from 1982-July 1987 was, and who, on December 1987, was reappointed as, Administrator of Oahu Community Correctional Center ("OCCC" or "prison"), and Michael Kakesako, who from 1975-1984 was the Administrator of the Corrections Division, Department of Social Services and Housing, State of Hawaii. To the extent respondents' complaint in the District Court seeks to name petitioners in their official capacities, petitioners are joined in this Petition by their successors in office, who are Allan Keliinui for Mr. Shimoda during the period of July-December 1987, and, for Mr. Kakesako, Theodore Sakai for the period 1984-87, and Harold M. Falk, Director of Corrections, thereafter. *See Karcher*

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v. May, 56 U.S.L.W. 4022, 4024-25 (U.S. Dec. 1, 1987). Until 1987, OCCC was administered by the Department of Social Services and Housing of the State of Hawaii. By the Act of June 29, 1987, ch. 338, 1987 Haw. Sess. L. 1096, OCCC is now administered by the state Department of Corrections. Any judgment against petitioners in their official capacities would accordingly be borne by the State of Hawaii. *Papasan v. Allain*, 106 S. Ct. 2932, 2940 (1986); *Helela v. State*, 49 Haw. 365, 369, 418 P.2d 482, 485 (1966).

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v.

EMMET AKAO, ALLEN V. TRIPP, AND GARRICK UMIAMAKA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Edwin T. Shimoda, Administrator, Oahu Community Correctional Center, and Michael Kakesako, Corrections Divisions Administrator, Department of Social Services and Housing, State of Hawaii, together with their successors in office, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 19, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 820 F.2d 302 (9th Cir. 1987), and is reprinted in Appendix

A. The amended opinion of the Court of Appeals is reported at 832 F.2d 119 (9th Cir. 1987). The order of the motions panel denying petitioners' motion to dismiss is unreported and is reprinted in Appendix C. The order of the Court of Appeals denying the petition for rehearing, rejecting the suggestion for rehearing *en banc*, and setting forth the court's amendment to its opinion, is unreported and is reprinted in Appendix H. The order of the District Court granting petitioners' motion to dismiss is also unreported and is reprinted in Appendix E.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 19, 1987. A petition for rehearing and suggestion of the appropriateness of rehearing *en banc* mailed on July 3, 1987, was treated by the court below as timely and was denied on the merits on November 9, 1987.[1] Under 28 U.S.C. § 2101 and this Court's

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[1] July 3, 1987, a Friday, was the 14th day after judgment in the court below, and the Petition for Rehearing was stamped "filed" by the clerk in San Francisco on Monday July 6, 1987. Our filing below was premised on Ninth Circuit practice, e.g., *Gaut v. Sunn*, 792 F.2d 874 (9th Cir. June 20, 1986), *pet. mailed*, No. 83-2320 (July 7, 1986), *resp. ordered* (July 20, 1986), *amended*, 810 F.2d 923 (Feb. 20, 1987), and our understanding that the Ninth Circuit considers Rule 40 petitions "briefs" to which the mailing rule stated in Fed. R. App. p. 25(a) applies. *See also* Ninth Cir. R. 1-1 (adopting this Court's mailing rule for filings on which appellate rules are silent).

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Rule 29.1, the time in which this Petition may be filed extends to and includes February 8, 1988, and this Petition was filed within the time allowed. Jurisdiction in

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Even if the above does not show that this Petition is timely, this Petition is still timely for the court of appeals in all respects treated the petition for rehearing as timely and denied it on its merits. *See Bowman v. Loperena,* 311 U.S. 262, 266 (1940). After the court accepted the petition as timely, the panel requested respondents to "file a response to the petition for rehearing," Order, *Okao v. Shimoda,* No. 84-1538 (9th Cir. Aug. 10, 1987), App. B, *infra,* and the mandate was stayed, as Fed. R. App. P 41(a) requires, App. G, *infra.* Respondents raised no issue that the Petition for Rehearing was untimely, *see* Answer to Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc, *id.* (9th Cir. mailed Aug. 24, 1987, Pet. App. 71, and, in disposing of the petition, the panel stated in its order that it "has voted to deny the petition for rehearing," Order, *id.* (9th Cir. filed Nov. 9, 1987), App. H, *infra.*

Particularly given the lower court's order requesting a response to our petition, *see* Fed. R. App. P. 35 and Ninth Circuit Rule 35-2, these facts alleviate concerns the Attorney General of Hawaii has expressed in other cases that this Court might treat certain petitions under Rule 40, Fed. R. App. P., mailed to, but not received by, the court of appeals on the 14th day after judgment as untimely for purposes of this Court's Rule 20.4, and ineffective to toll the time in which to seek review. *Compare* Pet. for Cert. at 3 n.1, *Public Utilities Comm'n v. Hawaiian Telephone Co.,* No. 87-1152 (U.S. filed Jan. 9, 1988) (no action by court of appeals on petition); *FTC v. Minneapolis-Honeywell Co.,* 344 U.S. 206, 210-11 (1952) (no paper even purporting to be a petition filed).

Under any set of assumptions, this Court accordingly has jurisdiction to act on this Petition for Certiorari, and, on this basis, we ask the Court to turn to the merits of this case. *Cf. Superintendent v. Hill,* 472 U.S. 445, 458 (1985) (Stevens, J., joined by Brennan, and Marshall, JJ., concurring in part and dissenting in part).

this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was alleged to have been conferred by 28 U.S.C. §§ 1343, 2201, and 2202, and was sustained by the Court of Appeals under 28 U.S.C. § 1331. If the court below allowed respondents to seek recovery against petitioners in their official capacities, petitioners urge that it lacked jurisdiction to do so by reason of the Eleventh Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides that

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Eleventh Amendment to the Constitution provides that

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the Constitution provides in relevant part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Section 1983 of Title 42, United States Code, provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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STATEMENT OF THE CASE

This case arises out of the efforts by the State of Hawaii to accommodate its rising prison population consistent with the demands of the Eighth Amendment. It presents the substantial issue of the circumstances in which convicted inmates may litigate claims for money damages against prison officials for the claimed effects of assertedly crowded prison conditions, and an equally important question of whether such claims may be pursued in light of a comprehensive class settlement, to which respondents were party, of complaints relating to Oahu prisons.

1. Like nearly every jurisdiction in the Nation, the State of Hawaii has experienced in recent years an explosion in its prison populations. This rise in inmate populations has been accompanied by massive increases in public expenditures for housing, medical care, rehabilitation, and related purposes.[2]

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[2] According to statistics compiled in 1987 by the Hawaii Legislature: "During fiscal year 1975, the corrections division had expended $6,491,835. There were 6 facilities and a popula-

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2. Despite these expenditures and efforts, on October 7, 1983, respondents Emmet Akao, Allen V. Tripp, and Garrick Umiamaka, three convicted inmates at the Oahu Community Correctional Center ("OCCC" or "prison"), filed this action in the United States District Court for the District of Hawaii to enjoin certain practices relating to housing in "Module-1," one of the several new units built in the 1970s after our legislature appropriated funds "for the construction of a modern prison." *See Upchurch v. State*, 51 Haw. 150, 153, 454 P.2d 112, 114 (1969). As stated in the complaint, Module-1 contains 24 rooms, including eight "corner rooms," each with floor space of 80.3 square feet, and air space of 637.3 cubic feet. Complaint ¶¶ 7, 10, 11, No. 83-1167 (D. Haw. filed Oct. 7, 1983), Pet. App. 18. The module also contains a spacious "recreation area," and inmates, at the time, were housed in cells for only nine hours a day, "from 10:30 P.M. untill [sic] 7:30 A.M. the following day." *Id.* ¶¶ 12, 14, Pet. App. 19.

3. The gravamen of respondents' complaint to the District Court was that prison officials on June 20, 1983, informed respondents that they would, during the nine hour evening period, begin "tripling up the 8 corner rooms which at that time housed two men," although "[t]he remaining 16 rooms would still house only two men." *Id.* ¶ 8. Respondents alleged that, "[d]ue to [present] population increases in Module-1, there is an increase in stress,

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tion of 403 inmates and 325 staff members. By fiscal year 1986, expenditures reached $36,432,607; there were 9 facilities and a plan to open a medium security facility within the year; and the staff for the facilities increased to 1,294 and the inmate population jumped to 2,143." Haw. Sen. Comm. Rep. No. 85-87 (Mar. 2, 1987), *to be reprinted in* 1987 Haw. Sen. J. —.

tension, communicable diseases, and a high increase in confrontations between inmates." Complaint ¶ 12.

Respondents did not allege that they lived in Module-1, or the corner rooms, or that they personally experienced increased stress, tension, communicable disease, or confrontations. Nor did respondents claim the level of cleanliness, medical care, or security for inmates in the Module was itself inadequate. And respondents did not allege that the increases were intended to punish the Module-1 inmates rather than spread the acute housing shortage as fairly as possible. Respondents prayed for relief barring "defendants, their successors in office, agents and employees and all other persons in active concert and participation with them from over crowding plaintiffs and housing 3 men in a room," and for an "injunction" that "[r]equires defendants to pay jointly, damages of $10,000.00," and "punitive damages of $10,000 00." *Id.* at 5.

4. Respondents' complaint was only one in a series of mass-produced complaints over alleged overcrowding at OCCC, all of which, contemporaneously with this action, were dismissed by the District Court on the pleadings for failure to state a claim upon which relief could be granted. *See, e.g., Lee v. Leyve,* No. 83-0438 (D. Haw. order of dismissal filed Nov. 23, 1983), *reprinted at* Pet. App. 29, *infra.* Other courts at the time this action had commenced had acted similarly. In an exhaustive opinion issued two months before the instant complaint was filed, the United States Court of Appeals for the Third Circuit sustained against Eighth Amendment attack a per capita space allotment of 19.5 square feet of sleeping space, about a third

less than that under triple-celling here. *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 999 (3rd Cir. 1983). In the Ninth Circuit, *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), had held that "increased violence," standing alone, did not state a claim for relief under § 1983, particularly when prison populations were increasing, and had ruled only generally that the Eighth Amendment was breached when "the shelter of the inmates is unfit for human habitation." *Id.* at 1249; *see also Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981). In *Rhodes v. Chapman*, 452 U.S. 337 (1980), this Court itself had held that unless prison conditions "deprive inmates of the *minimal* civilized measure of life's necessities," *id.* at 347 (emphasis added), such conditions cannot be a basis for § 1983 relief. *Rhodes* reserved whether overcrowding that in fact caused actual "rioting" would ever lead to an Eighth Amendment violation, and had noted the special delicacy of this issue inasmuch as "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." *Id.* at 349 n.14. Petitioners moved to dismiss the action under Rule 12(b)(6),[3] and the District Court, after joining respondents' actions with two identical suits, granted the motion and ordered all three actions dismissed with prejudice. *Akao v. Shimoda*, No. 83-1137 (D. Haw. filed Dec. 21, 1983). At no time in the District Court did respondents seek leave to amend. Respondents appealed.

5. Respondents with leave of court filed their opening brief in the Ninth Circuit more than a year later.

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[3] *See* Memorandum of Law in Support of Motion to Dismiss, No. 83-1067 (D. Haw. Dec. 1, 1983) (citing, e.g., *Rhodes, Hoptowit, Wright, Lee* and *Union County*), Pet. App. 26-28, *infra*.

Meanwhile, the Ninth Circuit had held, in *Toussaint v. Yockey,* 722 F.2d 1490 (9th Cir. 1984), that injunctive relief under the Eighth Amendment could be had under the circumstances in that case because the district court there found "double-celling engenders violence, tension and psychiatric problems," *id.* at 1492, and, in *Albers v. Whitley,* 743 F.2d 1372 (9th Cir. 1984), *reversed on other grounds,* 106 S. Ct. 1079 (1986), that qualified immunity under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), could not ever be asserted under the Eighth Amendment standard of "deliberate indifference" set forth in *Estelle v. Gamble,* 429 U.S. 97 (1976), because, in Judge Canby's words, "[a] finding of deliberate indifference is inconsistent with a finding of good faith or qualified immunity." 743 F.2d at 1376. When petitioners filed their answering brief, on June 5, 1985, *Harlow* immunity was not briefed as a ground on which to affirm the District Court judgment with respect to damages claims, if such claims were against petitioners in their individual capacities.

6. One week later, on June 12, 1985, the State of Hawaii and respondents, named plaintiffs in the class action, *Spear v. Aryoshi,* No. 84-1104 (D. Haw. decree entered June 12, 1985), Pet. App. 35, *infra,* entered into a comprehensive consent judgment settling an enormous range of prison condition issues at OCCC. The consent judgment, the first of its kind, establishes expert panels on medical care, food services and environmental health and safety, and corrections to submit plans including "objectives, timetables, and mechanisms for action," and contains mandatory mediation clauses that require all issues, including compliance with the decree and the plans, on which there is a dispute to "be presented to a mediator."

Pet. App. at 37-38. The decree allowed triple celling of *all* rooms in Module-1, the very source of respondents' charge of unconstitutional prison conditions, for two and a half years, until December 15, 1987, *id.* at 41-42.

Because under prevailing Ninth Circuit law respondents would be barred by the decree from litigating any claim arising prior to its entry, *see Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438-39 (9th Cir. 1985), the parties entered into an agreement that would permit plaintiffs to litigate "individual claims for declaratory, injunctive, and/or monetary relief," for example, claims that would arise if a guard randomly applied excessive force, but that barred further litigation of claims "applicable to more than the individual circumstances of a particular plaintiff class member." Consent Decree ¶ I.N, No. 84-1104 (D. Haw. June 12, 1985). The waiver clause reads:

> By entering into this Decree, plaintiffs and members of the plaintiff class are not waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief. The only claims against defendants settled herein are claims for injunctive relief of a general nature as detailed in the complaint filed in this case and which are applicable to more than the individual circumstances of a particular plaintiff class member.

Pet. App. 39-40. As instructed by cases such as *Maryland v. United States*, 381 U.S. 41, 53 n.38 (1965), petitioners immediately moved to dismiss the appeal, which clearly concerned a claim "applicable to more than the individual circumstances of a particular plaintiff class member," as moot. Pet. App. 34.

7. On July 11, 1985, a two-judge panel composed of Judges Farris and Wiggins denied the motion to dismiss.

Pet. App. 5. The panel reasoned that while the waiver clause should not be read literally, and thus "[t]he claims for injunctive *and* declaratory relief are moot," *id.* (emphasis added), the "claim for monetary relief is not moot, however." On June 19, 1987, more than three years after appeal was taken, a panel consisting of Judges Wallace, Kennedy, and Wiggins, reversed the district court in a *per curiam* opinion. The court reasoned that respondents' claim that the asserted increases in population in Module-1 had led to " 'an increase in stress, tension, communicable diseases, and a high increase in confrontations between inmates" stated a claim for monetary relief under the Eighth Amendment. The court relied entirely upon "the intervening *Toussaint* opinion," which was handed down "[s]ubsequent to the decision of the district court." 820 F.2d at 303, Pet. App. 2. The court instructed the lower court to permit an amendment not to repair any defect in the allegation of wrongdoing, but to assure that respondents could allege that "they *personally* have suffered cruel or inhuman punishment." *Id.* (emphasis added).

8. Six days later, on June 25, 1987, this Court handed down its decision in *Welch v. State Department of Highways,* 107 S. Ct. 2941 (1987), in which a majority of the Court refused to disturb the rule of *Hans v. Louisiana,* 134 U.S. 1 (1890), which barred respondents' monetary claims if such claims were against petitioners in their official capacity. The same day, this Court also issued its opinion in *Anderson v. Creighton,* 107 S. Ct. 3034 (1987), in which six Justices rejected analyses such as Judge Canby's in *Albers,* and held that for personal capacity claims for damages arising out of an unconstitutional act to survive a qualified immunity defense, "in light of preexisting law

the unlawfulness must be apparent." 107 S. Ct. at 3039. Petitioners sought rehearing and rehearing *en banc*, relying on *Welch*, *Anderson*, and other decisions, as well as on the conflict between the motions panel's decision to foreclose any attempt to show on remand that the consent decree's waiver clause barred respondents' claims, and the merits panel's decision to allow respondents leave to prove their factual claims. Although the court requested of and received from respondents a response to the petition for rehearing, the court denied the petition and rejected *en banc* review. Pet. App. 4, 14-15, 71.

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REASONS FOR GRANTING THE WRIT

Even if this Court had not decided *Anderson v. Creighton*, 107 S.Ct. 3034 (1987), or upheld *Hans v. Louisiana*, 134 U.S. 1 (1890), this case would merit review. The liability of prison officials faced with vague and evolving standards under this Court's Eighth Amendment jurisprudence is a substantial issue. Crowded prisons are truly a national problem. That prison officials, who must compete for scarce funds with other important programs that address "the most basic economic needs of impoverished human beings," *Dandridge v. Williams*, 397 U.S. 471, 487 (1970), may be liable for effects of an "increase in stress, tension, and communicable disease" caused by prison population increases would be a matter of such import to warrant granting review, even absent conflicts in the courts of appeals or a conflict with the decisions of the Supreme Court.

The Court does not, however, write upon this issue with a clean slate. The decision of the court below is plainly wrong under *Anderson* and *Hans*, not to mention the settled holding of *Quern v. Jordan*, 440 U.S. 332 (1979), that 42 U.S.C. § 1983 does not abrogate the States' immunity from suit in federal court. Just as important, the Ninth Circuit's decision makes meaningless a consent decree settling the largest prison litigation in the history of Hawaii and which was intended to keep just such time-consuming lawsuits as this out of the courts so that resources could be more effectively devoted to prison needs. The Ninth Circuit's refusal to permit petitioners even to submit evidence bearing on the parties' intent, which threatens settlement efforts of this nature across the Nation, contradicts numerous principles of summary adjudication, *e.g.*, *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948), and justiciability, *e.g.*, *Ellis v. Dyson*, 421 U.S. 426, 435 (1975), and ought to be the subject of this Court's review, and, ultimately, reversal.

I. The Ninth Circuit's Decision Directly Conflicts with the Decisions of this Court under the Qualified Immunity Doctrine and the Eleventh Amendment.

As clarified by this Court's *Anderson* decision, the objective qualified immunity enunciated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), provides that state officials performing discretionary functions "will not be held personally liable as long as their actions are reasonable in light of *current* American law." 107 S.Ct. 3042 (emphasis added). In light of *Anderson*, which clearly overruled the Ninth Circuit's analysis to the contrary in *Albers*, the Ninth Circuit's decision here is patently erroneous. For the court below recognized that the only way in which

respondent's complaint could be read to state a claim for relief was by virtue of the "intervening *Toussaint* opinion," which was handed down by the court below three months after respondents filed their complaint. *See* 722 F.2d at 1490. The decision to which respondents and the court below would hold petitioners was not part of "current American law" when petitioners were alleged to have violated respondents' rights. Under *Anderson*, respondents simply cannot prevail.

Respondents, seeking to bolster the judgment below in response to our petition for rehearing, cited the Ninth Circuit's decisions in *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), and *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), as establishing that "each of the effects of overcrowding alleged by plaintiffs forms the basis of an Eighth Amendment violation and did so at the time the complaint was filed." Pet. App. 77. But even though it is true that "this Court reviews judgments, not opinions," *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), respondents' argument to the lower court on why *Anderson* did not apply is exactly the argument that was rejected in *Anderson*. It of course was the law when this action was filed that conditions that "deprive inmates of the minimal civilized measure of life's necessities" "*could* be cruel and unusual under [a] contemporary standard of decency." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (emphasis added). But this, and the broad dicta in *Hoptowit* and *Spain*, take nothing from the fact that the Third Circuit had held expressly, months before this action commenced, that sleeping space a third smaller than that proposed for Module-1 here was constitutional, regardless of its effects on inmate morale, and

that district judges in Hawaii, including the judge in this case, had routinely dismissed overcrowding claims pleaded as violations of the Eighth Amendment. In light of the then-current legal landscape, petitioners could not have been " 'plainly incompetent' " in triple-celling Module-1 in the summer of 1983 even if that is what they did. *Anderson*, 107 S.Ct. at 3038 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In this regard, it should be of no small moment that respondents themselves, in consenting to the class action consent decree, agreed to triple-celling in the Modules for more than two years, until December 15, 1987.

Nor is it of any avail to respondents to assert that the matter of immunity is premature in light of the Ninth Circuit's granting of leave to amend. *Anderson* makes clear that "immunity questions should be resolved at the earliest possible stage of a litigation," 107 S.Ct. at 3042 n.6, and, more important, the Ninth Circuit did not grant a general leave to amend. Obviously concerned that respondents had not alleged any facts sufficient to sustain their standing to litigate, the court permitted an amendment, if one could be honestly made, that respondents "personally have suffered cruel or inhuman punishment." Pet. App. at 2-3. But under the panel order, any population level that " 'endangers violence, tension, and psychiatric problems' " is unlawful under the Eighth Amendment. *Id.* If respondents can allege they are victims of such phenomena, under the Ninth Circuit ruling their complaint can withstand a motion to dismiss even in light of *Anderson*. If that is not so, then the Ninth Circuit decision conflicts with the well-settled rule from *Foman v. Davis*, 371 U.S. 178 (1963), that futile amendments are not to be allowed under Fed. R. Civ. P. Rule 15. *Id.* at 182.

The ultimate answer to the Ninth Circuit's refusal to grant rehearing and affirm the district court is the inescapable conclusion that the panel decision on the merits quite seriously expands *Toussaint v. Yockey* itself. For in *Toussaint*, unlike here, inmates literally "live[d] in" cells providing less than twenty-five square feet per person and were so confined "for as much as 23½ hours a day." 722 F.2d at 1492. Respondents, by contrast, admitted that Module inmates spent only sleeping hours in their cells. Complaint ¶ 12, Pet. App. 19. It was just this difference that led the Third Circuit to rule in favor of the prison in *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3rd Cir. 1983).[4] The Ninth Circuit suggested it would do likewise. *Hoptowit*, 682 F.2d at 1249. It is thus at best surprising that the Ninth Circuit did not recognize, if its decision was not wrong on the merits, which it was, *see Whitley v. Albers*, 475 U.S. 312, 318-22 (1986), then at the least it was the sort of expansion of Eighth Amendment standards for which state officials should not, in their personal capacities, bear the cost in the form of burdensome damages litigation.

While the Ninth Circuit might have eluded the issue of qualified officer's immunity by recognizing that respon-

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[4] Prison officials in *DiBuono* did confess error as to the practice of requiring inmates to sleep on mattresses on the floor, a practice respondents alleged petitioners were about to institute in Module-1. *See* Complaint ¶ 8, Pet. App. 18. Even assuming that Hawaii's tropical climate, local customs, and respondents' own agreement to allow sleeping on the floor, Pet. App. 42-43, would not be subject to judicial notice in deciding the relevance of such an allegation for *Anderson* purposes, *but see Papasan v. Allain*, 106 S. Ct. at 2943, the concession of defendants in *DiBuono* does not make for clearly established *law*. *See United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 812 (1984) (on the significance of

(Continued on following page)

dents' claims were not against petitioners in their individual capacities at all, but in fact sought relief against the State of Hawaii, permitting a remand under this theory would be barred by the Eleventh Amendment and this Court's decision in *Quern v. Jordan*, 440 U.S. 332 (1979). As this Court has made clear on any number of occasions, official capacity suits for damages are barred by the Eleventh Amendment, for "[r]elief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant." *Papasan v. Allain*, 106 S. Ct. 2932, 2940 (1986) (citing cases). Litigation of official capacity claims in district court would be doubly wrong. As this Court noted in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), "a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh immunity in the federal courts." *Id.* at 99 n.8. Hawaii has not waived its immunity for constitutional torts even in its own courts. *Figueroa v. State*, 61 Haw. 369, 604 P.2d 1198 (1980). Given this Court's continued adherence to the rule of *Hans v. Louisiana*, 134 U.S. 1 (1980), *see Welch*, 107 S. Ct. at 2957-58 (Scalia, J., concurring in part and concurring in the judgment), the judgment below cannot stand on any claimed entitlement to litigate official capacity actions for damages in federal court.

On any understanding of the record, therefore, the lower court's decision conflicts with this Court's jurisprudence of official and sovereign immunity. Certiorari

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(Continued from previous page)

concessions by the Government); *see also Virginia v. American Booksellers Ass'n*, 56 U.S.L.W. 4113, 4117 (U.S. Jan. 25, 1988) (position of counsel in litigation "does not bind" courts).

should be granted to correct these conflicts, and substantial issues presented generally by damages claims such as those of respondents.

II. The Ninth Circuit's Decision to Give the Consent Decree in Spear v. Ariyoshi Absolutely No Effect in Precluding Damages Claims Departs from Settled Precepts of Adjudication and Warrants Review.

Perhaps the most disturbing feature of the decision below is that the court should never have reached the federal issues raised by respondents' complaint. For those issues, under any understanding, involved claims "which are applicable to more than the individual circumstances of a particular plaintiff class member," and were thus barred by the consent decree in *Spear v. Ariyoshi,* No. 84-1108 (D. Haw. filed June 12, 1985).

Respondents do not dispute they are named members of the class in *Spear.* Rather their argument to the court below was that the *Spear* plaintiffs "did not waive any claims for monetary relief." *See* Pet. App. at 79. Under respondents' view, everything that petitioners have done, are doing, or will do under the consent decree, can be litigated via damages suits no matter how clearly petitioners have complied with the decree, and regardless whether respondents fail to invoke the mediation procedures that are mandatory prerequisites to judicial relief under the decree. In accepting respondents' argument in this most important settlement, the Ninth Circuit departed from numerous established doctrines that govern justiciability problems raised by the entry of the instant decree pending appeal.

The importance of a correct interpretation of the consent decree cannot be overstated. In this instance the

federal question of the parties' intent in *Spear, see Limbach & Hooven v. Allison,* 466 U.S. 353, 362 (1984) (preclusive effect of federal judgment is a federal question), goes to the very jurisdiction of the court of appeals not just in this case, but in the dozens of cases that are certain to be brought if the respondents' view of the consent decree prevails. If, as we contend, petitioners did not agree to allow respondents to pursue such redundant litigation, "there no longer is a live controversy between the parties over whether a federal court can hear respondents' . . . claims." *Deakins v. Monoghan,* 56 U.S.L.W. 4061, 4063 (U.S. Jan. 12, 1988). As this Court stated in *Bender v. Williamsport Area School District,* 475 U.S. 534 (1986), "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Id.* at 541. Indeed, this court has taken special pains to give effect to efforts by Congress to preclude § 1983 litigation when the structure of a legislative scheme "has foreclosed such enforcement of the statute in the enactment itself," *Wright v. City of Roanoke Redevelopment & Housing Authority,* 107 S. Ct. 866, 770 (1987). Where the parties before the court have created an elaborate, and exclusive, mechanism for addressing difficult prison conditions, judicial protection against needless federal litigation under 42 U.S.C. § 1983 is even more warranted.

Respondents' view of the consent decree is objectively unreasonable. By incorporating discussion of money damages in the consent decree, respondents acknowledged that the relief in *Spear* could have run against defendants in their individual capacities, and, thus, petitioners and

their privies could take the full benefit of the *Spear* decree. Pet. App. 39-40; *see Restatement (Second) of Judgments* § 36(1); *Pulliam v. Allen*, 466 U.S. 522 (1984) (effect of injunctive relief under § 1983); *Nevada v. United States*, 463 U.S. 110, 128-30, 135 (on parties who may take the benefit of *res judicata*) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877)). Petitioners and respondents also created two classes of claims: (1) "individual claims for declaratory, injunctive, and/or monetary relief"; and (2) group claims for such relief, *i.e.*, "claims for injunctive relief of a general nature as detailed in the complaint filed in this case and [other claims] which are applicable to more than the individual circumstances of a particular plaintiff class member." Pet. App. 39-40. The latter were settled by *Spear*.

Although the respondents seek to make dozens of cases turn on the absence of the words "other claims" in the written decree, the Ninth Circuit itself recognized that such words must be read into the decree for the waiver clause to make sense. Thus, the Ninth Circuit held respondents' claims for injunctive *and* declaratory relief were moot. If this holding is correct, however, the claims for damages also were moot. The court below had no more authority to write the waiver for "more than individual circumstances" claims partially out of the *Spear* consent decree than it had to eliminate the clause completely.

Ultimately it was not necessary for the court of appeals, nor would it be necessary for this Court, to dispositively resolve the impact of the consent decree.

What the court below should have done pursuant to its duty to protect its jurisdiction from encroachment by litigants bringing moot cases was remand the question to the district court for a full development of the facts bearing on the parties' intent. Because the consent decree was entered after appeal was taken, petitioners had no choice but to present their plea of mootness to the court of appeals without the benefit of the district court's ability to find facts bearing on the parties' intent in light of what was, at worst for petitioners, an ambiguity in the written documents. Remand would have comported with this Court's practice in cases in which justiciability problems arise on appeal. *See Town of Lockport v. Citizens for Community Action,* 431 U.S. 259, 263, 264 n.9 (1977); *Ellis v. Dyson,* 421 U.S. 426, 435 (1975).

Indeed, inasmuch as the Ninth Circuit's ruling, in essence, granted summary judgment to respondents on the effect of the consent decree, the court's decision is in plain conflict with this Court's admonition that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import[.]" *Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1948); *see Anderson v. Liberty Lobby, Inc.,* 106 S. Ct. 2505, 2513-14 (1986) (factors bearing on whether summary judgment should be given). Indeed, if the panel was correct that a dismissal should not have been affirmed on the basis of the essentially legal issues presented by our immunity claims, *see Nixon v. Fitzgerald,* 457 U.S. 732, 743 n. 23 (1982), which it was not, then at least it was in error in upholding the motions' panel's summary decision adjudicating the parties' intent in settling the *Spear*

action.[5] "Treating issues of intent as factual matters for the trier of fact is commonplace." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). The decision below seriously breaches this rule.

Because the Ninth Circuit's rulings will likely bar petitioners from pursuing further their claim to protection under *Spear*, *see Matter of Beverly Hills Bancorp.*, 752 F.2d 1334, 1336 (9th Cir. 1984,) the court should grant certiorari to review the Ninth Circuit's departure from this Court's precedents that bear upon the mootness of this action, and the power of the lower courts to act under Article III.

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CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and ultimately reverse the decision of the court of appeals or vacate the judgment below and remand with instructions to remand the case to the district court so that the trial court may enter findings, prior to deciding the merits of any other federal issue, bearing upon the intent of the parties to the *Spear* litigation and,

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[5] By the admission of their counsel, there was substantial evidence that respondents themselves believed that the *Spear* decree mooted their claims. *See* Declaration of Counsel attached to respondents' Answer to Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc, Pet. App. 82 (respondents "did not want [petitioners] to spend time responding to our opening brief if we would ultimately have to abandon the appeal" (referring to conversations among counsel relating to respondents' evaluation of remedies provided by the decree). *See also* Pet. App. 67 n.1 (statement that counsel for respondents noted that " 'issues on appeal may be rendered moot' ").

hence, the mootness of this action. Because the Ninth Circuit had only the opportunity afforded by our petition for rehearing to correct its judgment in light of *Anderson* and *Welch*, the Court may wish to grant the petition, vacate the judgment below, and remand with instructions that the cause below be reconsidered in light of these decisions. *See Yates v. Aiken*, 56 U.S.L.W. 4065, 4066 (U.S. Jan. 12, 1988) (decision to vacate and remand for reconsideration even though intervening precedent had been "called to the attention of the [lower] court" and lower court had opportunity to address it). This course would also allow the petitioners to seek again to persuade the court of appeals that, as an alternative to affirming the district court's dismissal, the court below may wish to vacate the judgment of the district court and remand for a determination of the parties' intent in *Spear*. *See Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979).

Respectfully submitted,

WARREN PRICE, III
Attorney General
State of Hawaii

CORINNE K.A. WATANABE*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, ALLEN V. TRIPP and
GARRICK UMIAMAKA,

Plaintiffs-Appellants,

v.

EDWIN T. SHIMODA, Administrator of
Oahu Community Correctional Center, and
MICHAEL KANESAKO,
Corrections Division Administrator,

Defendants-Appellees.

No. 84-1538

D.C. No. CV 83-1067-SPK

OPINION

Argued and Submitted
April 13, 1987—San Francisco, California

Filed June 19, 1987

Before: J. CLIFFORD WALLACE, ANTHONY M. KENNEDY and CHARLES WIGGINS, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the District of Hawaii

Samuel P. King, District Judge, Presiding

OPINION

PER CURIAM:

Akao, Tripp, and Umiamaka (prisoners) brought a pro se action pursuant to 42 U.S.C. § 1983 alleging a vio-

lation of their eighth amendment right to be free from cruel and unusual punishment. The defendants in this action, the Director of Corrections and Administrator of the Oahu Community Correction Center, moved to dismiss. The district court dismissed their action, holding that it "is clear that [the prisoners] can claim no eighth amendment violations." Order, p.3. The prisoners appealed and we appointed *pro bono* representation. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse.

The district court properly held that an allegation of overcrowding without more does not state a claim under the eighth amendment. *Hoptowit v. Ray*, 682 F.2d 1237, 1249 (9th Cir. 1982). But more was alleged here: "Due to population increase in Module-1, there is an increase in stress, tension, communicable diseases, and a high increase in confrontations between inmates." Complaint, ¶ 12. Subsequent to the decision of the district court, we decided *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984), in which we affirmed a determination of an eighth amendment violation due to overcrowding when it "engenders violence, tension, and psychiatric problems." *Id.* at 1492.

Pro se complaints are held to a less strict standard than those drafted by a lawyer. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). It is appropriate to dismiss a pro se's action only if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id., quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Given the intervening *Toussaint* opinion, we cannot say now that this test has been met.

It is true that the prisoners' allegations are not sufficiently specific and do not allege that they personally

have suffered cruel or inhuman punishment, but we cannot hold that it is "beyond doubt" that they could not do so. Therefore, we reverse and remand for the district court to allow the prisoners to file an amendment.

Upon issuance of our mandate, *pro bono* counsel is relieved from his appointment. He may move for attorneys' fees and costs pursuant to 42 U.S.C. § 1988. *Leeds v. Watson*, 630 F.2d 674, 677 (9th Cir. 1980).

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, ALLEN V. TRIPP and
GARRICK UMIAMAKA,

Plaintiffs-Appellants,

-vs-

EDWIN T. SHIMODA, Administrator of
Oahu Community Correctional Center, and
MICHAEL KANESAKO,
Corrections Division Administrator,

Defendants-Appellees.

Filed August 10, 1987

CATHY A. CATTERSON, Clerk
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Hawaii

No. 84-1538

D.C. No. CV 83-1067-SPK

ORDER

Before: WALLACE, KENNEDY, and WIGGINS,
Circuit Judges.

Plaintiffs-appellants are requested to file a response to the petition for rehearing and suggestion for rehearing en banc filed by the defendants-appellees within fourteen (14) days from the date of this order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, ALLEN V. TRIPP and UMIAMAKA,

Plaintiffs-Appellants,

vs.

EDWIN T. SHIMODA, Administrator of
Oahu Community Correctional Center, and
MICHAEL KANESAKO,
Corrections Division Administrator,

Defendants-Appellees.

FILED July 11, 1985

PHILLIP B. WINBERRY
Clerk U.S. Court of Appeals

No. 84-1538

DC# CV 38-1067-SPK

Hawaii

ORDER

Before: FARRIS and WIGGINS, Circuit Judges

The claims for injunctive and declaratory relief are moot. The claim for monetary relief is not moot, however. Accordingly, appellees' motion to dismiss the appeal is denied.

APPENDIX D

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

HAWAII

CIVIL NO. 83-1067

EMMET AKAO, et al.

V.

MICHAEL KAKESAKO, et al.

SAMUEL P. KING, Judge

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came for consideration before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' Motion to Dismiss is hereby GRANTED.

Filed in the United States District Court
District of Hawaii

December 21, 1983

cc: Emmet Akao, pro se
Allen V. Tripp, pro se
Garrick Umiamaka, pro se
James H. Dannenberg, Esq.

/s/ WALTER A.Y.H. CHINN
Clerk

December 21, 1983

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 83-977

JEFFREY R. MUELLER, et al.,

Plaintiffs,

vs.

MICHAEL KAKESAKO, et al.,

Defendants.

CIVIL NO. 83-978

JOHN PAUL WILDER,

Plaintiff,

vs.

EDWIN T. SHIMODA,

Defendant.

CIVIL NO. 83-1067

EMMET AKAO, et al.,

Plaintiffs,

vs.

MICHAEL KAKESAKO, et al.,

Defendants.

Filed in the United States District Court
District of Hawaii

December 21, 1983

WALTER A. Y. H. CHINN, Clerk

ORDER GRANTING MOTION TO DISMISS

Plaintiff, all inmates at Oahu Community Correctional Center ("OCCC"), have filed pro se complaints pursuant to 42 U.S.C. § 1983. The gravamen of plaintiffs' complaints is prison overcrowding. Specifically, plaintiffs allege that corner cells in Module 1 at OCCC have been used to house three inmates between the hours of 10:30 p.m. and 7:30 a.m. Plaintiffs allege that the floor space of those cells is 80.33 square feet. This, plaintiffs contend, deprives them of their eighth amendment freedom from cruel and unusual punishment.

It is important to note at the outset that the eighth amendment is not a proper basis for broad prison reform. Legislatures and executives are charged with the responsibility of making the myriad of policy choices concerning prisons. *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979). The federal judicial function is limited to identifying and remedying constitutional violations. *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981).

The Ninth Circuit has been specific in identifying an institution's obligations under the eighth amendment. *See, e.g., Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981). Overcrowding itself is clearly not a violation of the eighth amendment. *Hoptowit v. Ray*, 682 F.2d 1237, 1249 (9th Cir. 1982). Moreover, "[i]f prisoners need not remain in their cells for a substantial part of the day, analysis of square footage in cells may be largely irrelevant." *Id.*

These consolidated cases are governed by the *Hoptowit* line of cases. Plaintiffs have done nothing more than allege the nighttime tripling of inmates in one cell. They

contend that the fact of three inmates in one cell at night has led to increased stress, tension, communicable diseases and confrontations. Even reading plaintiffs' allegations in a favorable light, *see Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976), these allegations are purely conclusory. *See Sherman v. Yakahi,* 549 F.2d 1287, 1290 (9th Cir. 1977). Assuming everything alleged by plaintiffs to be fact, plaintiffs have not described conditions so shocking or exreme as to violate society's evolving standards of decency or this Court's sensibilities. *See Hoptowit,* 642 F.2d at 1246. Thus, while plaintiffs may be able to describe rebarbative conditions at OCCC, which make a stay there uncomfortable in the extreme, is is clear that they can claim no eighth amendment violations.

The allegations do not state any violations of constitutional rights under 42 U.S.C. § 1983. The complaints fail to state a claim upon which relief can be granted.

IT IS THEREFORE ORDERED that defendants' motion to dismiss is GRANTED.

DATED: Honolulu, Hawaii, December 21, 1983.

/s/ Samuel P. King
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 83-977

JEFFREY R. MUELLER, et al.,

Plaintiffs,

vs.

MICHAEL KAKESAKO, et al.,

Defendants.

CIVIL NO. 83-978

JOHN PAUL WILDER,

Plaintiff,

vs.

EDWIN T. SHIMODA,

Defendant.

CIVIL NO. 83-1067

EMMET AKAO, et al.,

Plaintiffs,

vs.

MICHAEL KAKESAKO, et al.,

Defendants.

Filed in the United States District Court
District of Hawaii

December 21, 1983

WALTER A.Y.H. CHINN, Clerk

ORDER OF CONSOLIDATION

The complaints in these cases are substantially similar. In the interests of judicial economy and quick resolution of disputes, and in order to avoid unnecessary cost and delay, these cases will be consolidated pursuant to Local Rule 206-1.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 20, 1983.

/s/ Samuel P. King
United States District Judge

APPENDIX G

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, ALLEN V. TRIPP and
GARRICK UMIAMAKA,

Plaintiffs-Appellants,

vs.

EDWIN T. SHIMODA, Administrator of
Oahu Community Correctional Center and
MICHAEL KANESAKO,
Corrections Division Administrator

Defendants-Appellees.

Filed in the United States District Court
District of Hawaii

November 20, 1987

WALTER A.Y.H. CHINN, Clerk

No. 84-1538

DC CV 83-1067 SPK

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY

ATTEST NOVEMBER 17, 1987
CATHY A. CATTERSON, Clerk of Court

by: /s/ OSCAR TAGLE, Deputy Clerk

Filed and entered June 19, 1987.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, ALLEN V. TRIPP and
GARRICK UMIAMAKA,

Plaintiffs-Appellants,

v.

EDWIN T. SHIMODA, Administrator of
Oahu Community Correctional Center, and
MICHAEL KANESAKO,
Corrections Division Administrator,

Defendants-Appellees.

No. 84-1538

D.C. No. CV 83-1067-SPK

ORDER
AMENDING OPINION AND
DENYING REHEARING

Argued and Submitted
April 13, 1987—San Francisco, California

Filed June 19, 1987

Amended November 9, 1987

Before: J. Clifford Wallace, Anthony M. Kennedy and
Charles Wiggins, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

The opinion filed in the above case on June 19, 1987, is hereby amended as follows:

The last paragraph is amended to read: "Upon issuance of our mandate, *pro bono* counsel is relieved from his appointment."

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EMMET AKAO,
ALLEN V. TRIPP,
GARRICK UMIAMAKA,

Plaintiffs;

vs.

MICHAEL KAKESAKO,
Corrections Division Administrator,
EDWIN T. SHIMODA,
Administrator of Oahu Community
Correctional Center,

Defendants.

Civil No. 83-1067

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

OCT. 7, 1983

WALTER A.Y.H. CHINN, CLERK

COMPLAINT

I. JURISDICTION

1. This is a civil action authorized by 42 U.S.C. 1983 to redress the deprivation, under color of state law, of rights secured by the United States Constitution. The court has jurisdiction under 28 U.S.C. § 1343. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. 2201 and 2202.

II. PLAINTIFFS

2. Plaintiff Emmet Akao is and was at all times mentioned in this complaint a prisoner of the state of Hawaii in the United States of America in the custody of The Department of Corrections. He is presently confined in the Oahu Community Correctional Center at 2199 Kamehameha Highway, Kalihi, Hawaii, 96819.

3. Plaintiff Allen Y. Tripp is and was at all times mentioned in this complaint a prisoner of the state of Hawaii in the United States of America in the custody of The Department of Corrections. He is presently confined in the Oahu Community Correctional Center at 2199 Kamehameha Highway, Kalihi, Hawaii, 96819.

4. Plaintiff Garrick Umiamaka is and was at all times mentioned in this complaint a prisoner of the state of Hawaii in the United States of America in the custody of The Department of Corrections. He is presently confined in the Oahu Community Correctional Center at 2199 Kamehameha Highway, Kalihi, Hawaii, 96819.

III. DEFENDANTS

5. Defendant Michael Kakesako is the Director of the Corrections Division of the Department of Social Services and Housing. He is legally responsible for the overall operation of the Department of Corrections and each institution under its jurisdiction; including Oahu Community Correctional Center.

6. Defendant Edwin T. Shimoda is the Administrator of Oahu Community Correctional Center. He is legally responsible for the welfare of all the prisoners of that prison.

IV. FACTS

7. On or about November 10, 1982, in Module-1, at the Oahu Community Correctional Center, the population was 24 inmates. Staff informed plaintiffs that an additional 22 inmates were to be added to the population of Module-1. So the population was doubled from the designed maximum capacity of 24 residents to 46 inmates. This was done by taking out the single man beds and replacing them with steel framed double bunks in each of the 24 rooms, bringing maximum capacity up to 48.

8. Then on or about June 20, 1983, in Module-1, at the Oahu Community Correctional Center, the population was 48, the staff informed plaintiffs that an additional 8 men were to be now housed in Module-1. Facility personnel would do this by tripling up the 8 corner rooms which at that time housed two men. This meant that third man in each of the corner rooms would be sleeping on the floor. The remaining 16 rooms would still house only two men.

9. The available space in these corner rooms was architecturally designed for one man.

10. The floor space of the corner rooms is 80'4'' square feet. There are a toilet, steel double bunk and a sink/desk combination that use up a good deal of the room space. Of the limited floor space, the addition of a third mattress on the floor utilizes most of the open area. This restricts movement drastically. The remaining space is inadequate for the storing of inmates personal belongings. (see exhibit A attached hereto)

11. The volume of air in the corner rooms is 637'4'' cubic feet, which is not even up to minimum standards for 2 people, let alone three.

12. Inmates in Module-1, are housed at night for 9 consecutive hours from 10:30 P.M. until 7:30 A.M. the following day. Due to population increase in Module-1, there is an increase in stress, tension, communicable diseases, and a high increase in confrontations between inmates.

13. Plaintiffs have been told this is a permanent move and in the future the middle rooms could triple.

14. Also it is general knowledge that the facility is now considering using the recreation area on the upper floor levels in the module to house inmates, at a later date if the need arises.

VI. FIRST CAUSE OF ACTION

15. Defendants and their agents, by housing 3 men in a room designed for one, violated plaintiff's rights to be free from cruel and unusual punishment of the Eighth amendment to the United States Constitution.

VII. EQUITY

16. The plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiffs have been and will continue to be irreparably injured by the conduct of the defendants unless the court grants the declaratory and injunctive relief which plaintiffs seek.

VIII. RELIEF

WHEREFORE, plaintiffs respectfully request that this court enter a judgment granting them relief:

1. A declaratory judgment that the defendants' acts, policies and practices herein described and complained of violated plaintiff's rights under the United States Constitution.

2. A preliminary and permanent injunction which:

a) Prohibits the defendants, their successors in office, agents and employees and all other persons in active concert and participation with them from over crowding plaintiffs and housing 3 men in a room.

b) Prohibits defendants, their successors in office, agents and employees and all other persons in active concert and participation with them from transferring plaintiffs to any other institution, without plaintiff's express consent, during the pendency of this law suit, or otherwise retaliating against plaintiffs in any way.

c) Requires defendants to pay jointly, damages of $10,000.00.

d) Requires defendants to pay jointly punitive damages of $10,000.00.

3. Plaintiffs respectfully request such other and further relief that the court deems to be appropriate and just.

Respectfully submitted,

/s/ Emmet Akao
Emmet Akao, pro se

/s/ Allen V. Tripp
Allen V. Tripp, pro se

/s/ Garrick Umiamaka
Garrick Umiamaka, pro se

Dated: 9/29/83

Verification

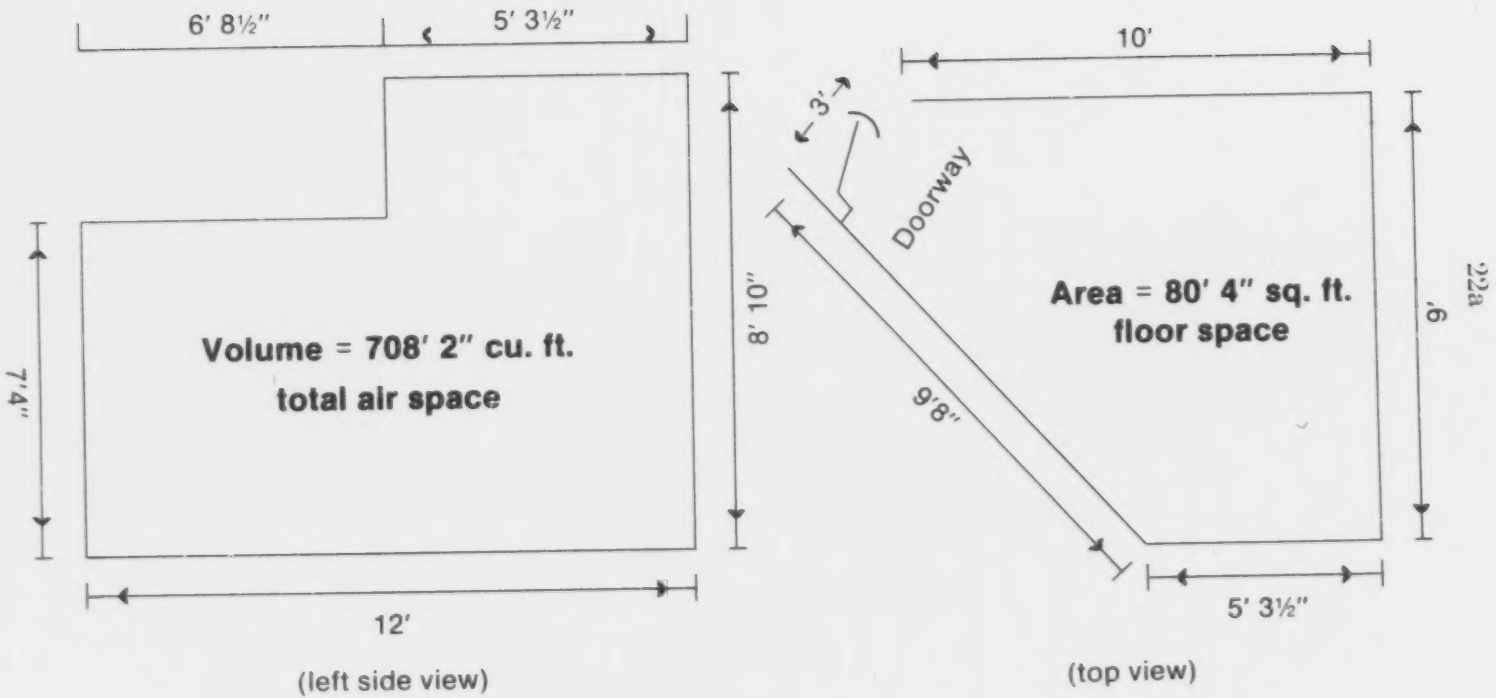
Emmet Akao, Allen V. Tripp, Garrick Umiamaka, being first duly sworn according to law, deposes and says that he resides at Oahu Community Correctional Center, 2199 Kamehameha Highway, Kalihi, Hawaii, 96819; that he is the plaintiff in the foregoing complaint; and that he has read the foregoing complaint and knows the contents thereof and that the same are true and correct of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes to be true.

/s/ Emmet Akao
Emmet Akao, pro se
Oahu Community Correctional Center
2199 Kamehameha Highway
Kalihi, Hawaii 96819

/s/ Allen V. Tripp
Allen V. Tripp, pro se
Oahu Community Correctional Center
2199 Kamehameha Highway
Kalihi, Hawaii 96819

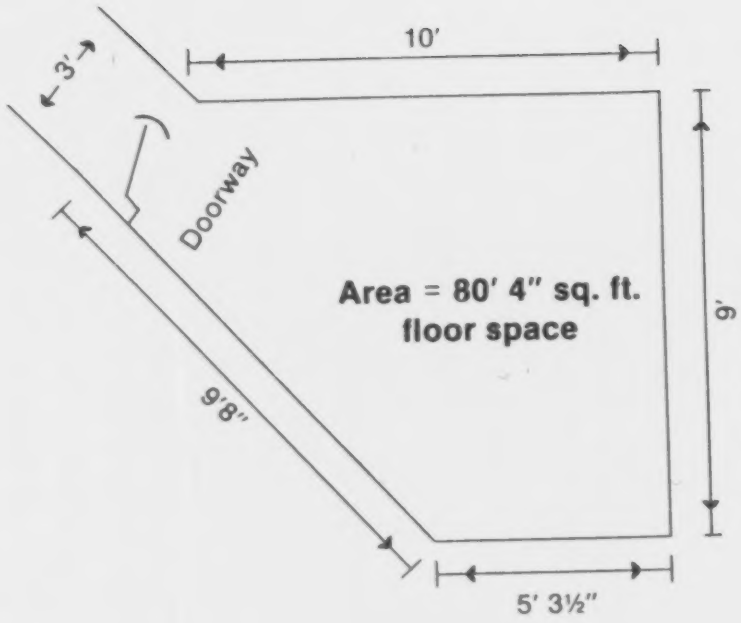
/s/ Garrick Umiamaka
Garrick Umiamaka, pro se
Oahu Community Correctional Center
2199 Kamehameha Highway
Kalihi, Hawaii 96819

"Bottom Corner Rooms"



"Top Corner Rooms" (top view)

*NOTE: The height of this room and any room for the top floor is, 7' 8", flat. Therefore, the volume of the corner rooms on the tops floors is, 637' 4" cu. ft., the total air space.



(top view)

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EMMET AKAO, et. al.,

Plaintiffs,

vs.

MICHAEL KAKESAKO, et. al.,

Defendants.

CIVIL NO. 83-1067

NOTICE OF MOTION; MOTION TO DISMISS;
MEMORANDUM OF LAW; APPENDIX A

Hearing: Dec. 27, 1983; 10:30 a.m.

Honorable Harold M. Fong

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

DEC. 1, 1983
at 10 o'clock and 05 min. a.m.

WALTER A. Y. H. CHINN, CLERK

NOTICE OF MOTION

TO: EMMET AKAO
ALLEN V. TRIPP
GARRICK UMIAMAKA

PLEASE TAKE NOTICE that the fol' owing Motion to Dismiss will be heard before the Honorable Harold M. Fong, United States District Judge, in his courtroom in the United States Courthouse, 300 Ala Moana Blvd., Hono-

lulu, Hawaii, on Tuesday, the 27th day of December, 1983, at 10:30 o'clock a.m. or soon thereafter as counsel may be heard.

MOTION TO DISMISS

Defendants, through their undersigned attorneys, hereby move this honorable Court to dismiss the above-entitled action for failure to state a claim against them upon which relief can be granted.

This Motion is based upon Rule 12(b)(6), Federal Rules of Civil Procedure, and on the ground that no claims are stated which arise under the Constitution or Laws of the United States.

Dated: Honolulu, Hawaii, Nov. 30, 1983.

TANY S. HONG
Attorney General
State of Hawaii

/s/ JAMES H. DANNENBERG
Deputy Attorney General
Attorneys for Defendants

MEMORANDUM OF LAW
INTRODUCTION

Plaintiffs are convicted inmates incarcerated at Oahu Community Correctional Center ("OCCC"). Their sole cause of action relates to the allegation that the corner cells in Module 1 at OCCC have, since June 20, 1983, been used to house three inmates between the hours of 10:30

p.m. and 7:30 a.m. The floor space of such cells is alleged to be 80'4''.[1] For obvious reasons, the complaint fails to state a claim upon which relief can be granted.

CROWDING AND THE EIGHTH AMENDMENT

Defendants do not deny that various circumstances beyond their control have led to crowded conditions at OCCC — and at virtually every other American prison. These crowded conditions have been the source of defendants' concern for some time, and because of that concern there has been extensive remodeling and renovation at Hawaii prisons, and substantial funds have been obtained for a new prison. It is clear, however, at least in the Ninth Circuit, that mere overcrowding is not a denial of rights under the Eighth or any other amendment to the Constitution. *Hoptowit v. Ray*, 682 F.2d 1237, 1248-49 (9th Cir. 1982). *Lee v. Leyve*, Civil No. 83-0438, U.S.D.C., D. Haw. (Nov. 23, 1983, King, C.J.). (Attached as Appendix A.) The *Hoptowit* court specifically reversed the district court's finding of unconstitutionality, which "rel[ied] exclusively on per capita square footage recommendations." *Id.* at 1249. Only when specific circumstances, in and of themselves, become so shocking as to independently constitute Eighth Amendment violations may the courts find for

---

[1] The Court's attention is directed to an identical complaint filed by three other inmates in *Mueller, et al v. Kakesako, et al.*, Civil No. 83-0977. Defendants' Motion to Dismiss is presently set before this Court on December 27, 1983, at 10:30 a.m.

Plaintiff Akao also has filed complaints in Civil Nos. 83-0999 and 83-1069.

plaintiffs.[2] The "totality of circumstances" method of analysis was specifically rejected by the Ninth Circuit in *Hoptowit* and *in Wright v. Rushen*, 642 F.2d 1129, 1133 (9th Cir. 1981). *Accord, Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 999 (3rd Cir. 1983); *Ruiz v. Estelle*, 679 F.2d 1118, 1136 (5th Cir. 1982). In *Ruiz v. Estelle*, for example, the court held that "Neither the number of inmates in one cell nor the amount of space provided in a dormitory alone determines whether confinement is cruel and unusual." *Id.* at 1146. Likewise, the Third Circuit in *Union County Jail Inmates v. DiBuono, supra* at 999 *reversed* the district court's ruling that:

> the stark reality is that 30 square feet of daytime space or 19.5 square feet of sleeping space fails to meet any contemporary standard of decency especially in light of the impact overcrowding has had on visitation, recreation and time off the tier.

These holdings are all consistent with the Supreme Court's holdings in *Bell v. Wolfish*, 441 U.S. 520 (1979) (pretrial inmates) and *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (sentenced inmates), which held, *inter alia*, that no "static tests," such as square footage, would suffice to determine whether prison conditions violated the Eighth Amendment.[3]

---

2 It is difficult to conceive how the allegations contained in paragraph 12—"an increase in stress, tension, communicable diseases, and a high increase in confrontations between inmates"—could satisfy the *Hoptowit* test. Plaintiffs do not even allege that *they* have been affected by crowding.

3 Of course, by plaintiffs' own measurements, they have considerably more space than the inmates in *Union County*.

Indeed, even if limited square footage were the source of constitutional violation, plaintiffs' complaint, at paragraph 12, makes clear that they are required to suffer such crowding only during sleeping hours. Since by their own admission they are out of their cells at least 15 hours per day, the test of *Hoptowit v. Ray, supra,* at 1249, that out-of-cell time is relevant in any Eighth Amendment inquiry, is doubly satisfied.[4]

Finally, it is no small point that plaintiffs have not alleged that they are housed in Module 1 or that they are housed in corner rooms. On the face of the complaint they have no standing to litigate. *City of Los Angeles v. Lyons,* — U.S. —, 75 L.Ed.2d 675 (1983); *Tileston v. Ullman,* 318 U.S. 44 (1943).

CONCLUSION

It is clear that plaintiffs are displeased with crowded conditions at OCCC. So are defendants, but such conditions simply do not reach the level of constitutional deprivation. As Justice Powell wrote for the Court in *Rhodes v. Chapman,* 452 U.S. at 347:

> To the extent that such conditions [crowding] are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

---

[4] In fact, if required, defendants will prove that Module 1 is a large and modern (less than three years old) housing unit built to federal specifications. It is well furnished, carpeted, and air conditioned, and it contains such amenities as a pool table, television, and microwave oven. Although admittedly crowded, it represents state of the art prison construction, and one might easily misidentify it as a college dorm.

For the reasons set out above, defendants request that the court dismiss the complaint for failure to state a claim upon which relief can be granted.

DATED: Honolulu, Hawaii, Nov. 30, 1983.

TANY S. HONG
Attorney General
State of Hawaii

/s/ JAMES H. DANNENBERG
Deputy Attorney General
Attorneys for Defendants

APPENDIX A
TO MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOHN G. LEE, aka
GREGORY H. PASSAILAIGUE,

Plaintiff,

vs.

SANDRA LEYVE, etc., et. al.,

Defendants.

CIVIL NO. 83-0438

FILED IN THE

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

NOV. 23, 1983
at 9 o'clock and 25 min. a.m.

WALTER A.Y.H. CHINN, CLERK

ORDER GRANTING MOTION TO DISMISS

Plaintiff filed the herein Complaint on April 19, 1983. Plaintiff, a sentenced felon detained at Oahu Community Correctional Center (OCCC), was a pretrial detainee at the facility for approximately eleven months. The allegations in the Complaint relate to events and conditions occurring while he was a pretrial detainee.

Even if a pretrial detainee is presumed innocent, defendants need not meet the high standard of showing compelling necessity for their actions, instead, they need only show that the imposed conditions are not punishment. *Bell v. Wolfish,* 441 U.S. 520 (1979). If the conditions imposed are incident to some legitimate public purpose, such as security or order, and the restrictions are not excessive for that purpose, then the conditions do not amount to punishment. *Id.* Presently, the alleged conditions must be examined to determine whether they constitute punishment.

Densely populated cells alone do not amount to a denial of constitutional rights. *Id.*; *Hoptowit v. Ray,* 682 F.2d 1237 (9th Cir. 1982). Detainees are allowed time outside their cells several times a week. Furthermore, the Complaint does not allege any specific deprivations as a result of overcrowding which rise to the level of a constitutional claim. Holding pretrial detainees is necessary to insure their presence at trial and the crowded conditions themselves are not excessive.

Plaintiff alleges communication problems such as lack of access to the mails and telephone. He claims that in some of these instances these problems hindered communi-

cations with his attorney. These hindrances were necessary for security reasons and do not rise to Sixth Amendment stature. The system provided by authorities for access to the court and attorneys is adequate. The prison authorities provide ample time for attorney visitation. Furthermore, the system provides a stamp for free mailing of documents once a week. Prison authorities also provide a system for telephone use. Also, the Court notes that plaintiff has been able to file numerous motions in this case, in addition to the original Complaint.

Reductions of telephone and visitation privileges were caused on occasion by disruptions in the facility. Actions taken by prison authorities to resume and maintain security and order required reductions of communications on occasion. Not only did the reductions serve a legitimate public purpose, but they were necessary and were not excessive.

Plaintiff complains of denial of access to the prison law library. Access to law libraries is only one of a number of constitutionally permissible means of access to the courts. *United States v. Wilson,* 690 F.2d 1267 (9th Cir. 1982). Availability of legal assistance at government expense, if required, is a constitutionally permissible means of access to the courts. *Id.* Plaintiff was adequately represented by counsel during the period of time in question. Thus, plaintiff's allegations of constitutional violations for lack of access to the prison law library are meritless.

Even if true, the conditions stated in plaintiff's medical complaints do not attain the level of violations of constitutional rights. Constitutional violations for medical

mistreatment do not arise unless medical problems are life-threatening or "shock the conscience." *Estelle v. Gamble,* 429 U.S. 97 (1976). Plaintiff does not allege such conditions.

The allegations do not state any violations of constitutional rights under 42 U.S.C. § 1983. The Complaint fails to state any claim upon which relief can be granted.

Accordingly, IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED.

DATED: Honolulu, Hawaii, November 23, 1983.

/s/ Samuel P. King
United States District Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, et al.,
Plaintiffs-Appellants,

vs.

EDWIN T. SHIMODA, etc., et. al.,
Defendants-Appellees.

NO. 84-1538

DC# 83-1067-SPK

Hawaii (Honolulu)

F I L E D

June 21, 1985

PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

MOTION TO DISMISS APPEAL FOR MOOTNESS

EXHIBIT A

AFFIDAVIT OF JAMES H. DANNENBERG

PROPOSED ORDER

CERTIFICATE OF SERVICE

CORINNE K. A. WATANABE
Acting Attorney General
State of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General
State Capitol
Honolulu, Hawaii 96813
Telephone: 548-4740

Attorneys for Defendants-Appellees

MOTION TO DISMISS APPEAL FOR MOOTNESS

Defendants-Appellees, through their undersigned attorneys, hereby move this Court to dismiss the above-entitled appeal because of mootness.

This motion is made pursuant to Rule 27, F.R.A.P. and Rule 6, Rules of the United States Court of Appeals for the Ninth Circuit, and is based upon the attached affidavit of counsel and Exhibit A appended thereto. The ground for this motion is that a consent decree was entered on June 12, 1985, in *Spear, et al. v. Ariyoshi, et al.*, U.S.D.C. Civil No. 84-1104 (D. Haw.), which covers the conditions complained of in the instant appeal; appellants in this appeal are members of the plaintiff class in *Spear*, and the resolution of identical issues by consent makes the issues in the instant appeal moot.

Dated: Honolulu, Hawaii, June 19, 1985

CORINNE K. A. WATANABE
Acting Attorney General
State of Hawaii

/s/ James H. Dannenberg
Deputy Attorney General
Attorney for Defendants-Appellees

EXHIBIT A

MARY E. MCCLYMONT
ALVIN J. BRONSTEIN
National Prison Project of the American
Civil Liberties Union Foundation
Suite 402, 1346 Connecticut Avenue, N. W.
Washington, D. C. 20036
(202) 331-0500

MICHAEL D. WILSON
Suite 610, 333 Queen Street
Honolulu, Hawaii 96813
(808) 526-0811

MARK S. DAVIS
10 Marin Street
Honolulu, Hawaii 96817
(808) 524-7500

PAMELA J. BERMAN
Suite 606, 1314 So. King Street
Honolulu, Hawaii 96814
(808) 526-9781

ERIC A SEITZ
Suite 105, 547 Halekauwila Street
Honolulu, Hawaii 96813
(808) 533-7434

DANIEL R. FOLEY
American Civil Liberties
Union of Hawaii
33 South King Street, Suite 412
Honolulu, Hawaii 96813
(808) 545-1722

Attorneys for Plaintiffs

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

June 12, 19085

Walter A.Y.H. Chinn, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 84-1104

Civil No. 84-1104

AGNES SPEAR, et al.,
Plaintiffs

v.

GEORGE ARIYOSHI, et al.,
Defendants

CONSENT DECREE

By agreement of the parties, the following consent decree shall be submitted for approval by the Court to resolve the issues being litigated in CA No. 84-1104 and the cases consolidated therein by the Court. The parties herein now waive hearing and agree to the provisions contained herein as follows:

I. GENERAL PROVISIONS

A. This agreement is entered into to resolve an existing dispute between plaintiffs, individually and those similarly situated as defined below, and the defendants concerning appropriate conditions in and policies, procedures and practices necessary to operate the Oahu Community Correctional Center (OCCC) and the Hawaii Women's Correctional Facility (HWCF) in a manner which will satisfy federal constitutional standards. This agreement satisfies and resolves the claims of the class of plaintiffs, excepting only any attorney's fees and costs of plaintiffs' counsel. Defendants reserve the right to contest any application made by plaintiffs for fees and costs.

B. Defendants do not admit nor is there any finding that any constitutional rights of plaintiffs have been violated.

C. The plaintiffs brought this suit as a class action seeking to represent members of the class for purposes of securing declaratory and injunctive relief. For purposes of this agreement, the class shall be those persons which the court has previously identified and certified as members of the class pursuant to its order dated September 26, 1984. The class includes those inmates who are confined at the Oahu Community Correctional Center (OCCC) and the Hawaii Women's Correctional Facility (HWCF), or who may be so confined in the future.

D. The defendants agree to operate all institutions housing class members in a manner consistent with the terms of this agreement, and the Constitution of the United States. This agreement in no way constitutes an adjudication or finding of any present or past unlawful practice by the defendants, it being fully understood that the defendants unequivocally deny that any such acts or practices exist or have occurred. The parties have entered into this Decree solely as a means to put a reasonable end to the controversy and to avoid the costs, time and risks which litigation would involve for both parties.

E. Defendants and plaintiffs shall agree upon a panel of experts for each of the substantive areas covered in this Decree. Each panel shall consist of a representative of the Division of Corrections, and two experts who are designated by the parties. The panel shall study the issues and develop specific implementation plans for the various substantive areas set forth in Sections III, IV, and V of this Decree within the periods of time and pursuant to the guidelines and principles as stated herein.

F. The implementation plans shall contain objectives, timetables, and mechanisms for action. In the event

of a dispute amongst the panel members, the disputed issues shall be presented to a mediator for resolution. The parties have agreed upon Allen Breed as the mediator. The parties shall be given notice of any issue submitted to the mediator. Upon completion the plans shall be submitted to the parties for their review and to the Court for approval and incorporation into the Decree. Any objections to completed plans by either party shall be submitted to the Court for resolution within thirty (30) days after their receipt.

G. Beginning April 1, 1986, the panels shall conduct semi-annual inspections and prepare reports indicating the state of defendants' compliance with the provisions of the respective plans which reports shall be provided to the Court and the parties. These inspections shall continue until December 1, 1988 unless a particular panel shall have certified that the defendants have achieved full compliance in their particular substantive area for one year.

H. The parties further agree that any dispute between panel members or the parties concerning implementation or compliance issues shall first be submitted to the mediator for resolution. These issues shall be submitted to the Court only if they have not been resolved by the mediator.

I. The Court shall retain jurisdiction in this case until all plans incorporated herein are fully implemented and satisfactory and sustained compliance has been demonstrated by defendants in all substantive areas. At such time the defendants may move the Court for abrogation of this Decree in whole or in part. Nothing stated herein shall prevent plaintiffs from moving the Court for additional or further relief upon a claim of non-compliance.

J. Until the Court relinquishes jurisdiction in this case Counsel for plaintiffs shall have access to and shall receive copies of documents which effectuate the implementation of this Decree. Counsel for plaintiffs shall have access to all plaintiffs at reasonable times and under reasonable circumstances. Plaintiffs' counsel shall have access to all staff and institutions, upon reasonable notice to defendants' counsel. Defendants' counsel may be present at any meetings between plaintiffs' counsel and defendants' staff.

K. Defendants shall immediately explain the terms of this Decree to all of their agents, servants, representatives, and employees, including institutional staff, correctional officers and other personnel, in order to assure their understanding of the requirements of this Decree and the necessity for strict compliance herewith. Defendants shall require strict compliance with this Decree by said persons. Defendants shall require continued training of all staff regarding this Decree.

L. Members of the plaintiff class agree not to engage in any acts which would result in non-compliance with any terms of this Consent Decree through no fault of the defendants. Members of the plaintiff class will assist the defendants in maintaining public property in the best condition possible by not damaging or destroying public property in the institutions.

M. Notice to the plaintiff class shall be provided in accordance with the notice provisions approved by the Court and appended hereto.

N. By entering into this Decree, plaintiffs and members of the plaintiff class are not waiving any rights to

pursue individual claims for declaratory, injunctive, and/or monetary relief. The only claims against defendants settled herein are claims for injunctive relief of a general nature as detailed in the complaint filed in this case and which are applicable to more than the individual circumstances of a particular plaintiff class member.

O. Unless specific provision for extension is otherwise made in this Decree, any timetable proposed in this Decree may be subject to extension by the Court upon a showing of reasonable grounds for such extension by the defendants so long as the need for delay is not caused by the neglect or dereliction or actions of defendants. Plaintiffs reserve the right to object in good faith, and to oppose any requests for extension of time by the defendants.

P. The parties agree that nothing in this Decree is intended to prevent defendants from implementing new programs or changes in physical conditions which benefit plaintiffs; nor is the Decree intended to, and it shall not, have the effect of decreasing or abrogating the rights, programs or conditions which existed prior to this Decree pursuant to defendants' policies, procedures or other lawsuit settlements; nor shall it abrogate any substantive rights or procedural protection plaintiffs may now have or hereafter acquire under state or federal statutes. The defendants shall carry out every provision of this Decree in good faith.

II. POPULATION
OCCC

A. The defendants agree to reduce the population of the Oahu Community Correctional Center (OCCC) to a number no greater than 1018 by December 15, 1987, the

date presently scheduled for the completion and occupancy of the Halawa Medium Security Facility (HMSF). For purposes of this paragraph, OCCC shall include all of the housing units set forth in paragraph B below. The maximum population of 1018 shall not be exceeded after this date. The maximum population figures for OCCC are derived from a study commissioned by defendants and completed in 1983 by Dr. Allen Ault (incorporated herein by reference). Increases from the original Ault figures are as a result of additional housing construction at OCCC since 1983, and the parties agree that revision of the maximum population level as a result of any future construction at OCCC shall be made consistent with the criteria set out by Dr. Ault or otherwise by agreement of the parties.

B. The defendants agree that the following maximum population figures for the following respective housing areas shall not be exceeded on or after December 15, 1987:

1) Old cellblock (Block A): 226

Dormitories in Block A shall house no more than the following numbers of inmates:

Dormitory 1—21
Dormitory 2—21
Dormitory 3—23
Dormitory 4—21
Dormitory 5—21
Dormitory 6—23
Dormitory 7—15
Dormitory 8—23

2) Old Administration Building (Block B): 73

3) Keehi Annex—84

4) Panabode—32

5) Laumaka—15

6) Holding Unit—36

7) Module 1—48
Module 2—48
Module 3—60
Module 4—60
Module 7—24
Module 8—24
Module 11—48
Module 13—48
Module 17—48
Module 18—72
Module 19—72

C. The following housing provisions shall take effect at the times set forth herein and shall not be abrogated in the future.

1) Effective immediately, except under extraordinary circumstances, inmates in the module areas may be multiple celled only if they are confined to their cells for no more than ten (10) hours a day.

2) As of September 15, 1985:

a) no inmate shall be required to sleep on a mattress on the floor due to lack of space for a bunk in Block A.

b) as a general rule, no mentally ill or disturbed inmate shall be housed in Block A or the Holding Unit until the panel created under section III herein has completed its plan.

3) No later than December 15, 1987 shall:

a) any inmate be multiple-celled in Block A or the Holding Unit.

b) any inmate classified as administrative or management segregation, disciplinary segregation or protective custody be housed other than in single cells.

c) any inmate be required to sleep on a mattress on the floor due to lack of space for a bunk in any housing unit.

d) any more than two (2) inmates be housed in any single room in the module areas.

4) Notwithstanding any of the foregoing any two inmates may elect voluntarily to be double-celled.

D. By October 1, 1985, the population at OCCC shall not exceed 1270.

E. The defendants agree that no dormitory or corridor unit in Block A shall be used for inmate housing after August 1, 1988 unless such housing unit therein is renovated and brought into compliance with all relevant environmental standards of the American Correctional Association (Standards for Adult Correctional Institutions) and the American Public Health Association (Standards for Health Services in Correctional Institutions).

HWCF

E. The defendants agree that the maximum population figures for the respective housing areas at HWCF shall be determined by the Corrections panel designated in paragraph V(A) below on or before October 1, 1985 and the population limits as determined by the panel shall become effective on or before December 15, 1985. The hous-

ing areas referred to herein are Hookipa Cottage, Maluhia Cottage, and Interim Facility.

F. The Detention Unit at HWCF in its present configuration shall no longer be used for the housing of inmates as of July 1, 1985 except for limited use as "time-out" housing for no more than 48 hours. In addition, the continued use of this Unit for such purpose shall be reviewed and finally determined by the Medical and Corrections panels established in this Decree by October 1, 1985.

G. The maximum population figures set forth in this Section shall be effectuated through, but not limited to, a combination of the following measures:

1) Transfer of inmates to other institutions; 2) a review of the sentenced population by the Hawaii Paroling Authority to determine the appropriateness of parole in individual cases; 3) a review by the Circuit Court of the non-sentenced population to determine the appropriateness of present bail levels; and 4) a review of furlough eligibility by the Corrections Division for all appropriate inmates. The reduction of the OCCC population by the agencies described herein shall be coordinated by the Governor's Task Force on Prison Overcrowding and the defendants shall make a good faith effort to continually reduce the population between October 1, 1985 and December 15, 1987. It is understood and agreed by parties that no inmate will be released prior to the expiration of his or her sentence if it is determined that he or she represents a danger to society.

III. MEDICAL AND MENTAL HEALTH SERVICES

A. A medical/mental health panel is hereby created and shall consist of one representative from the Division of Corrections and *Ronald Shansky,* M.D., and *Armond Start,* M.D. The panel in consultation with selected representatives of the Hawaii Medical Association, the Hawaii Psychiatric Society, and the Hawaii Psychological Association, shall evaluate medical and mental health needs at OCCC and HWCF. The panel shall develop a specific plan to address those needs and to ensure adequacy in, *inter alia,* the following areas: physician, dental, mental health and nursing coverage; emergency care; training of medical staff and correctional officer staff as to medical and mental health related areas; development of policies, procedures and protocols; medication distribution and pharmacy services; dental coverage; medical and mental health admission screening; provision of physical examinations; provision of special therapeutic diets and coverage by a dietician; medical records and sufficient records personnel; housing, assessment, and treatment of mentally disturbed and suicidal inmates; and a sick call system and follow-up procedures to ensure routine access to medical care. The plan shall be completed by October 1, 1985 and shall be fully implemented August 1, 1986.

IV. FOOD SERVICES AND ENVIRONMENTAL HEALTH AND SAFETY

A. A food services and environmental health panel is hereby created and shall consist of one representative of the Division of Corrections and *Ward Duel* and *Jerrold Michael.* The panel shall evaluate food services operations

at OCCC and HWCF and develop a specific plan in order to address and ensure adequacy in, *inter alia,* the follow-areas: staff and inmate worker training in the food service area; staff supervision; food storage, transportation and preparation; dishwashing procedures and maintenance of safe temperatures; record keeping and written policies and procedures; the proper feeding of inmates in all satellite feeding operations; and appropriate upkeep and cleaning of equipment and facilities. The plan shall also provide for regular inspections by appropriate state authorities and for daily inspections by the food service staff at the prisons.

B. The panel shall also develop a specific plan to address and ensure adequacy at OCCC and HWCF in all aspects of the following environmental health and safety areas: ventilation, lighting, plumbing and sanitary facilities, electrical, fire safety, general sanitation, vermin control, bedding, laundry and general preventative institutional maintenance. The plan shall also provide for regular inspections by appropriate state and local authorities as well as by maintenance personnel.

C. The food service and environmental plans shall be completed by October 1, 1985 and shall be fully implemented by August 1, 1986.

D. The panel, in developing the aforementioned plans, shall be guided by the relevant standards of the ACA, the APHA and the National Fire Protection Association.

V. CORRECTIONS

A. A corrections panel is hereby created and shall consist of one representative from the Division of Correc-

tions and *Patrick McManus* and *Jerry Enomoto.* The panel shall evaluate correctional service at OCCC and HWCF. The panel shall develop a specific plan to address needs and ensure adequacy in, *inter alia,* the following areas:- security staffing and training, classification and inmate activity. In addition, the defendants agree that the hours for inmate recreation shall hereafter be no less than what is provided under the current schedule, a copy of which is appended hereto.

B. The plan shall be completed by October 1, 1985 and shall be fully implemented by August 1, 1986.

C. The panel, in developing their plan, shall be guided by the relevant standards of the ACA.

VI. MODIFICATION

This consent decrees hall be approved by the Court with the provision that the Court has the power to modify the Decree upon proper motion for modification by one or both of the parties or their successors and after notice and hearing before the Court.

Agreed to this 12 day of June, 1985.

/s/ James H. Dannenberg
Deputy Attorney General

/s/ Mary E. McClymont
ALVIN J. BRONSTEIN
National Prison Project of the
American Civil Liberties
Union Foundation, Inc.

MICHAEL D. WILSON
MARK S. DAVIS
PAMELA J. BERMAN
ERIC A. SEITZ
DANIEL R. FOLEY
Counsel for ACLU of Hawaii Foundation

Counsel for Plaintiffs

APPROVED AND SO ORDERED:

/s/ Spencer Williams
UNITED STATES DISTRICT JUDGE

AGNES SPEAR, et al., individually and on behalf of all other persons similarly situated, Plaintiffs, vs. GEORGE ARIYOSHI, et al., Defendants—Civil No. 84-1104—STIPULATION OF PARTIAL SETTLEMENT AND ORDER.

DEPARTMENT OR SOCIAL SERVICES
AND HOUSING
CORRECTIONS DIVISION

Oahu Community Correctional Center

M E M O R A N D U M
TO All Concerned
SUBJECT Revised Recreation Schedule

Effective June 3, 1985.

Date June 3, 1985.
FROM /s/ Deanna Espinas,
ASSA

Attached is the revised schedule for Recreation Field, Recreation Hall, and Courtyard. Please note that *only* the Recreation Unit has authority to cancel the field or hall activity. They will contact Central Control to inform

them of any cancellation. Reports of recreational activities and cancellations will be submitted to OCA via ASSA. We would appreciate your assistance in this matter.

Submitted by:
/s/ Marcus Dacanay
Recreation Unit

Noted: /s/ Fred Ragasa — June 4, 1985
Date

Noted: /s/ Miles Murakami — June 3, 1985
Date

Approved: /s/ Edwin T. Shimoda — June 3, 1985
Date

OAHU COMMUNITY CORRECTIONAL CENTER
RECREATION HALL SCHEDULE

*Mod 7 in courtyard Mon. - Fri. 11-12 **Mod 8 in courtyard Mon. - Fri. 12-1

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
8:15 am to 10:15 am		Dorm 2 Dorm 3	Corr. B Corr. D Dorm 5	Dorm 4 Dorm 6	Corr. A Dorm 1	Dorm 2 Dorm 3	
11:00 am to 12:00 N		Corr. C	Corr. C	Corr. C	Corr. C	Corr. C	
12:15 pm to 2:15 pm		Dorm 4 Dorm 6	Corr. A Dorm 1	Dorm 2 Dorm 3	Corr. B Corr. D Dorm 5	Dorm 4 Dorm 6	
3:10 pm to 4:10 pm	Module 7* Module 8**	Dorm 8	Dorm 8	Dorm 8	Dorm 8	Dorm 8	Module 7 Module 8
5:30 pm to 7:00 pm	Church Service 5:00 pm-6:00 pm A-Block Movie	Corr. B Corr. D Dorm 5	Dorm 4 Dorm 6	Corr. B Corr. D Dorm 5	Dorm 4 Dorm 6	Corr. B Corr. D Dorm 5	Dorm 7
7:05 pm to 8:30 pm	Alternate Floors Every other week	Dorm 7 Corr. A Dorm 1	Dorm 2 Dorm 3	Dorm 7 Corr. A Dorm 1	Dorm 2 Dorm 3	Dorm 7 Corr. A	Block B movies 2nd/4th week 1st/3rd week Dorm 8 Rec.

RECREATION FIELD SCHEDULE

	Monday	Tuesday	Wednesday	Thursday	Friday
8:30 am to 10:00 am	Module 11 Module 13 Module 18	Module 4 Module 19	Module 1 Module 2 Module 3	Module 11 Module 13 Module 18	Module 4 Module 19
12:30 noon to 2:00 pm	Module 4 Module 19	Module 11 Module 13 Module 18	Module 4 Module 19	Module 1 Module 2 Module 3	Module 1 Module 2 Module 3
3:10 pm to 4:10 pm	B Block Module 17	Module 1 Module 2 Module 3	B-Block Module 17	B-Block Module 17	Module 11 Module 13 Module 18
6:00 pm to 8:00 pm	Module 1 Module 2 Module 3	B-Block Module 17	Module 11 Module 13 Module 18	Module 4 Module 19	B-Block Module 17
8:30 pm to 10:00 pm	Annex	Annex	Annex	Annex	Annex

DEPARTMENT OF SOCIAL SERVICES AND HOUSING
CORRECTIONS DIVISION

OAHU COMMUNTY CORRECTIONAL CENTER

MEMORANDUM Date May 30, 1985.

To All Concerned FROM Rec. Unit (Marcus Docanay)

SUBJECT Revised Facility Movie Schedule

Effective 6/10/85, every living area will view two movies per month as scheduled by the Rec. Unit.

	Sun.	Mon.	Tue.	Wed.	Thur.	Fri.	Sat.
1st/3rd Week	——	——	12 Noon M8	——	12 Noon M7	——	——
1st/3rd Week	6:00 pm Block A (1st flr.)	6:00 pm M4	6:00 pm M18	6:00 pm PC	6:00 pm M13	6:00 pm M11	6:00 pm M2
2nd/4th Week	6:00 pm (2nd flr.)	6:00 pm M19	6:00 pm M1	6:00 pm M3	6:00 pm M17	6:00 pm Annex	6:00 pm Block B

Noted: /s/ Fred Ragasa
CS

Noted: /s/ Deanna Espirnis
ASSA

Noted: /s/ Miles Murakami
APCA

Approved: /s/ Edwin T. Shimoda
OCA

Spear v. Ariyoshi, Civil No. 84-1104

NOTICE

This is a class action proceeding pursuant to Rules 23(a) and 23(b)(1) of the Federal Rules of Civil Procedure. The named plaintiffs represent a class of all inmates who are now, or in the future may be, incarcerated at Oahu Community Correctional Center (OCCC) and the Hawaii Women's Correctional Facility (HWCF).

The action was not one seeking monetary damages. Its sole purpose was to secure injunctive and declaratory relief.

The parties have agreed that the proposed consent decree settles and resolves all substantive claims in this lawsuit.

On June 12, 1985, the Court provisionally approved the proposed consent decree.

However, pursuant to Rule 23(e), F.R.C.P., all members of the plaintiff class confined at OCCC and HWCF will be provided with a copy of this notice and a copy of the proposed consent decree will be posted in each housing unit and ten (10) copies will be available in the institutional libraries. Such copies will be delivered and posted on or before June 26, 1985. Class members will have 30 days to deliver any written comments to the court:

Honorable Spencer Williams
U. S. District Judge
450 Golden Gate Avenue
San Francisco, California 94102

The court will fully consider any objections to the consent decree.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-1538

DC # 83-1067-SPK

Hawaii (Honolulu)

EMMET AKAO, et al.,

Plaintiffs-Appellants,

vs.

EDWIN T. SHIMODA, etc., et. al.,

Defendants-Appellees.

AFFIDAVIT OF JAMES H. DANNENBERG

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

JAMES H. DANNENBERG, being first duly sworn, on oath deposes and says that:

1. He is a deputy Attorney General, State of Hawaii, and counsel of record for defendants-Appellees in the above-entitled appeal;

2. On June 12, 1985, parties in *Spear, et al. v. Ariyoshi, et al.*, U.S.D.C. Civil No. 84-1104 (D. Haw.) ("Spear") signed and filed, with Court approval, a consent decree covering conditions of confinement, including crowding and triple-celling, at the Oahu Community Correctional Center and the Hawaii Women's Correctional Facility; a true copy of that consent decree is attached hereto as Exhibit A;

3. Plaintiff-Appellants are members of the duly certified class of inmates bound by the consent decree in *Spear;*

Further Affiant sayeth naught.

/s/ James H. Dannenberg

Subscribed and sworn to before me
this 19th day of June, 1985.

/s/ Teruko Wong
Notary Public, State of Hawaii
My commission expires: 6/8/86

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-1538

DC# 83-1067-SPK

Hawaii (Honolulu)

EMMET AKAO, et al.,

Plaintiffs-Appellants,

vs.

EDWIN T. SHIMODA, etc., et. al.,

Defendants-Appellees.

PROPOSED ORDER

The Court having reviewed Defendants-Appellees' Motion to Dismiss Appeal for Mootness, and the records and files herein, and finding that the issues raised in the instant appeal have been resolved by the consent decree in *Spear, et al. v. Ariyoshi, et al.*, U.S.D.C. Civil No. 84-1104 (D. Haw., June 12, 1985);

IT IS HEREBY ORDERED that defendants-appellee's Motion to Dismiss Appeal for Mootness is GRANTED and the appeal is hereby DISMISSED.

DATED: San Francisco, California.....

.....

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the following by depositing the same in the United States mail, postage prepaid, on June 19, 1985, addressed as follows:

Emmet Akao
2199 Kamehaneha Highway
Honolulu, Hawaii 96819

/s/ James H. Dannenberg
Deputy Attorney General

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, et al.,

Plaintiffs-Appellants,

vs.

EDWIN T. SHIMODA, etc., et. al.,

Defendants-Appellees.

NO. 84-1538

DC# 83-1067-SPK
Hawaii (Honolulu)

FILED

July 6, 1987

CATHY A. CATTERSON
Clerk, U.S. Court of Appeals

PETITION FOR REHEARING AND SUGGESTION OF THE APPROPRIATENESS OF REHEARING EN BANC

[Material Deleted in Printing]

I. STATEMENT OF COUNSEL

I express a belief, based on professional judgment, that rehearing pursuant to Fed. R. App. P. 40(a), and Ninth Circuit Rule 13(e)(2), or that rehearing en banc pursuant to Fed. R. App. P. 35(a), and Ninth Circuit Rule 12, is necessary to review and correct the panel opinion in this matter [hereinafter cited as "Slip op."], because of the following substantial reasons:

(*a*) The panel decision fails to recognize applicable sovereign and qualified immunity defenses that are

apparent on the face of the decision; moreover, these immunities have been reaffirmed and expanded by the recent opinions of the United States Supreme Court in *Welch v. State Department of Highways,* 55 U.S.L.W. 5046 (U.S. June 25, 1987) (Eleventh Amendment immunity), and *Anderson v. Creighton,* 55 U.S.L.W. 5092 (U.S. June 25, 1987) (qualified official immunity), both of which were handed down after the panel decision in this matter; although it is within the Court's power to remand these issues to the District Court, and we view the panel decision to have done so, *Dandridge v. Williams,* 397 U.S. 471, 475-76 n.6 (1970), the error of permitting this litigation to go forward is so plain as to counsel rehearing, or rehearing *en banc,* and reversal. *See Washington v. Davis,* 426 U.S. 229, 238 (1976) (plain error);

(*b*) The motions panel decision of July 11, 1985, by refusing to recognize that all damage claims for overcrowding were settled by the consent decree in *Spear v. Ariyoshi,* No. 84-1184 (D. Haw. June 12, 1985), of which plaintiffs were named class members, overlooks the plain language of the consent decree in violation of *res judicata* and Article III, improperly rendering summary judgment to plaintiffs on these issues; and

(*c*) The holding that appellants' *pro bono* counsel "may move for attorneys' fees and costs" at this stage of the litigation, Slip. op. at 4, is plain error in light of the decision of the Supreme Court of the United States in *Hewitt v. Helms,* 55 U.S.L.W. 4907 (U.S. June 19, 1987), *reaffirming Hanrahan v. Hampton,* 446 U.S. 754 (1980), because appellants, even if they may not be dismissed, have not received any "relief on the merits of [their] claims." *Hewitt,* 55 U.S.L.W. at 4909;

II. THE PANEL OPINION, INTERVENING DEVELOPMENTS, AND STATEMENT OF ISSUES MERITING REHEARING OR EN BANC REVIEW.

A. The Panel Opinion and Summary of Reasons Why Rehearing or En Banc Review Should Be Granted.

The panel's *per curiam* decision, *Akao v. Shimoda*, No. 84-1538 (9th Cir. June 19, 1987) ["Slip op."] [copy attached as addendum "A"], holds that *pro se* allegations that increases in prison population that lead to " 'an increase in stress, tension, communicable diseases, and a high increase in confrontation between inmates,' " Slip op. at 3 (quoting Complaint ¶ 12), state a claim under the Eighth Amendment, redressable under 42 U.S.C. § 1983 (1982). Slip op. at 3. To reach this result, the panel relies solely on the "intervening" decision in *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984), handed down more than three months after the complaint here was filed. *See* C.R. 1 (complaint filed on Oct. 7, 1983). A motions panel of this Court earlier had dismissed all claims for non-money relief as moot in light of the consent decree entered in *Spear v. Ariyoshi*, No. 84-1104 (D. Haw. filed June 12, 1985). The panel left intact claims for monetary relief notwithstanding that the class plaintiffs in *Spear*, including appellants here, waived all claims "which are applicable to more than the individual circumstances of a particular class member". *See* Order, *Akao v. Shimoda*, No. 84-1538 (9th Cir. July 11, 1985) [copy attached as addendum "B"]; Motion to Dismiss Appeal for Mootness, (June 21, 1985) [copy attached as addendum "C"].

Apparently because the complaint in this case did not clearly allege whether plaintiffs were proceeding against

the state officers named therein in their official capacity, in which case the monetary claims would be clearly subject on remand to an Eleventh Amendment defense in the courts below, *see Papasan v. Allain*, 106 S. Ct. 2931 (1986), or in their individual capacity, in which case the doctrine of qualified official immunity stated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), would protect the state officials in any further proceedings, the panel decision of June 19, 1987, left these immunity issues, as well as disposition on the merits by summary judgment, or a full-blown trial, for remand under the established rule of appellate discretion stated in decisions such as *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970); *cf. Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Patsy v. Florida Board of Regents*, 457 U.S. 496, 515-16 & n.19 (1982). Despite these remaining issues, however, the panel, citing *Leeds v. Watson*, 630 F.2d 674 (9th Cir. 1980), held that appellants' *pro bono* counsel may immediately "move for attorneys' fees and costs pursuant to 42 U.S.C. § 1988."

Rehearing or rehearing *en banc* should be granted to correct three fundamental errors that infect the panel decisions here.

First, assuming, *arguendo*, that everything in the panel decisions is correct, it is clear in light of recent decisions from the Supreme Court of the United States that no monetary damages could be had in this case. Under *Welch v. Department of Highways*, 55 U.S.L.W. 5046 (U.S. June 25, 1987), *reaffirming Hans v. Louisiana*, 134 U.S. 1 (1980), no damages may be had against state officers sued in federal court in their official capacities. More significantly, under *Anderson v. Creighton*, 55 U.S.L.W. 5092 (U.S. June 25, 1987), and the qualified

immunity that exists under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), no liability can exist against an officer in his individual capacity because "[t]he contours of the right [at issue] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 55 U.S.L.W. at 5093. Because the panel relies for its analysis entirely on "the intervening *Toussaint* opinion," Slip op. at 3, it will be impossible for plaintiffs to overcome *Harlow* immunity in the lower courts. Although in general this Court has discretion to remand unadjudicated defenses to the lower courts, when an immunity defense is as clear as that here it would be manifest error not to affirm.

Second, in conclusively rejecting appellees' defenses based on the consent decree in *Spear v. Ariyoshi*, No. 84-1104 (D. Haw. June 12, 1985), the panel decision contradicts its own rationale of permitting parties to present all colorable claims to the District Court. Rather than reject our mootness defense outright, given the waiver language of the consent decree the panel should at the least have vacated the lower court's judgment and remanded with instructions to make findings with respect to whether there is present a live "controversy" with respect to damages liability. Rehearing or rehearing *en banc* should therefore be granted to correct this egregious violation of appellees' rights under the consent decree, which were arrived at after lengthy negotiations with counsel for plaintiffs in perhaps the most exhaustive class-action lawsuit to have been brought against the State of Hawaii in its history.

Third, even if all the foregoing is incorrect, rehearing or rehearing *en banc* should be granted to correct that part of the panel decision that suggests that appellants'

counsel may immediately move for attorneys fees pursuant to 42 U.S.C. § 1988. The panel ruling that attorneys fees may be awarded at an interlocutory stage is in plain conflict with numerous decisions in this Circuit, and at least two decisions of the Supreme Court of the United States, including *Hanrahan v. Hampton*, 446 U.S. 754 (1980), and *Hewitt v. Helms*, 55 U.S.L.W. 4907 (U.S. June 19, 1987). For this reason, rehearing or *en banc* review should be granted, and the Court's opinion should be amended to provide that attorneys fees may not be awarded unless and until plaintiffs ultimately prevail on remand.

B. The Panel Decision Remanding this Case Should Be Vacated and the Judgment Affirmed Because It is Clear Beyond Peradventure that Appellees Would Have Immunity Even if the Plaintiffs on Remand Could Prove Their Claims.

It is a hallmark of appellate procedure that this Court "review judgments, not opinions," and that an appellee may sustain the judgment below "on any ground that finds support in the record." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *see also Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *Plaine v. McCabe*, 790 F.2d 742, 751 (9th Cir. 1986); *Bernard v. City of Palo Alto*, 699 F.2d 1023, 1024-25 & n.1 (9th Cir. 1983). The record in this case now includes the panel decision, which holds that monetary relief can be had for prison overcrowding in 1983 solely on the basis of an "intervening" decision of this Court that was not handed down until 1984. Slip op. at 3 (quoting *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984)).

Even if the State officials in this case were *appellants*, and unable to make use of the "any ground in the record"

rule, the panel decision that relief may be had on remand is so egregiously wrong that it would violate the plain error rule to reaffirm the panel judgment. *See Washington v. Davis,* 426 U.S.229, 238 & n.9 (1976) (citing cases); *see also Toussaint v. McCarthy,* 801 F.2d. 1980, 1106 n.27 (9th Cir. 1986). Because we are appellees, it is even plainer that the panel decision should be overturned. No purpose whatever will be served by remanding this case to the lower court. For even if everything the panel says about the Eighth Amendment is true, and even if plaintiffs could prove every allegation in the complaint, the relevant immunity defenses truly make this a case in which "the same result would obtain." *Bernard v. City of Palo Alto,* 699 F.2d 1023, 1025 n.1 (9th Cir. 1983). We thus ask the panel, or the *en banc* Court, to grant rehearing, and affirm the judgment on sovereign and official immunity grounds.

The reasons for this Court to so are especially forceful in light of two recent decisions of the United States Supreme Court, of which the panel did not have the benefit when it decided this matter on June 19, 1987. In the first, *Welch v. Department of Highways,* 55 U.S.L.W. 5047 (U.S. June 25, 1987), a plurality of the Court reaffirms *Hans v. Louisiana,* 134 U.S. 1 (1890), which holds that "the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in federal court." 55 U.S.L.W. at 5048. Justice Scalia, who was presented for the first time with the issue whether *Hans* should be overruled, strongly suggested he supports the *Hans* rule, which "has been assumed to be the law for nearly a century," *id.* at 5054 (Scalia, J., concurring in part and concurring in the judgment). Until further notice, the low-

er federal courts must assume that damages in official capacity actions against State officials, by state citizens, in actions under 42 U.S.C. § 1983, are barred. *Papasan v. Allain*, 106 S. Ct. 2932, 2940 (1986); *compare Ouern v. Jordan*, 440 U.S. 332, 342-43 (1979), *with Welch*, 55 U.S. L.W. at 5054 (Scalia, J., concurring); *see Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986). If this is an official capacity suit, the District Court is powerless to grant monetary relief.

The Supreme Court's second recent decision bearing on this case, *Anderson v. Creighton*, 55 U.S.L.W. 5092 (U.S. June 25, 1987), shows the same result must obtain if this is an action against State officers in their individual capacities. In *Anderson*, the Court made clear that "[p]laintiffs [cannot] convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." 55 U.S.L.W. at 5093. Reversing the Eighth Circuit, the Court chastened the lower court for "refus[ing] to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances." *Id.* (emphasis in original). Substantially clarifying *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that officials *must* granted immunity when "their actions are reasonable in light of current American law." 55 U.S.L.W. at 5094. There is no exception to qualified immunity for "intervening" decisions of "American law" that prove state action unlawful after it has occurred. Under the panel decision here, the only way money damages on an individual-capacity theory

can be awarded is on the basis of such an "intervening" decision. In light of *Anderson*, however, the District Court could not award such damages.

Although it is plainly within this Court's discretion to remand the *Anderson* issue to the District Court, and we understand that litigation under *Anderson* may continue below under the panel decision as it now stands, the interests of both appellants and appellees would be served by a prompt decision on the fundamentally legal issue of whether, assuming all the allegations of the complaint could be proved, "the actions the [plaintiffs] allege [defendants] to have taken are actions that a reasonable officer could have believed lawful." 55 U.S.L.W. at 5095 n.6; *see also Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986) (per curiam) (citing *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985)). The panel decision itself permits only one answer to that question: given that a constitutional violation could be stated here only because of the "subsequent" and "intervening *Toussaint* opinion," Slip. op. at 3, there is no way the State officers can be held to have known that the complaint here could give rise to a valid cause of action under the Eighth Amendment. *See generally Rhodes v. Chapman*, 452 U.S. 337 (1981); *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982). Wholly aside from whether the panel wrongly expanded *Toussaint v. Yockey* to encompass the vague allegations of the instant complaint, *see Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986) (idleness that creates "violence and psychological pain" is not an Eighth Amendment wrong), there is no way, given *Anderson*, that *Harlow* immunity can be avoided. For that reason, rehearing

should be granted, and the judgment affirmed because no damages could be awarded in light of the Eleventh Amendment and the decision in *Anderson*.

C. Rehearing or En Banc Review Should Be Granted to Correct the Error of the Motions Panel in Completely Rejecting Our Claim That the Damage Claims Here Were Settled by the Consent Decree in Spear v. Ariyoshi, No. 84-1104 (D. Haw. 1985).

Although the panel that decided the merits of this case was quite charitable when it came to giving the plaintiffs every chance to prove their claims, the two-judge motions panel that rejected our claim that "the resolution of identical issues by consent makes the issues in the instant appeal moot," Motion to Dismiss Appeal for Mootness at 2, No. 84-1538, was much more confident of its ability summarily to resolve fact issues. This confidence was misplaced. In ruling that "[t]he claim for monetary relief is not moot," Order, No. 84-1538 (9th Cir. July 11, 1987), the motions panel misread the consent decree, misapplied the doctrine of *res judicata*, and mistook its role in passing upon suggestions that there is no "case" or "controversy" under Article III of the Constitution.

First, the motions panel's ruling that the consent decree does not resolve this case could not be more wrong. As stated in the waiver clause of the decree, the parties in *Spear v. Ariyoshi* distinguished between "individual claims for declaratory, injunctive, and/or monetary relief," which were saved, and claims for group relief, monetary or not, which were not:

> N. By entering into this Decree, plaintiffs and members of the plaintiff class are not waiving any rights

> to pursue *individual* claims for declaratory, injunctive, and/or monetary relief. The only claims against defendants settled herein are claims for injunctive relief of a general nature as detailed in the complaint filed in this case *and which are applicable to more than the individual circumstances of a particular plaintiff class member.*

Consent Decree at 8, *Spear v. Ariyoshi*, No. 84-1104 (D. Haw. June 12, 1985), Ex. "A" to Motion to Dismiss Appeal for Mootness, *Akao v. Shimoda*, No. 84-1538 (9th Cir. June 21, 1985). This language makes clear that monetary claims for injuries common "to more than the individual circumstances of a particular plaintiff class member," such as the overcrowding alleged in the instant complaint, were waived. If they were not, no purpose whatever would have been served by the language specifying that claims "which are applicable to more than the individual circumstances of a particular plaintiff class member" were waived. Just as it is wrong in statutory cases not "to give effect to all parts of a statute," *Camara v. Agsalud*, 67 Haw. 212, 215, 685 P.2d 794, 797 (1984), so too was it wrong to read the "more than individual circumstances" language as superfluous. The plaintiffs in *Spear*, represented by the wellknown National Prisons Project of the American Civil Liberties Union, were well-informed of the rules that make it hard to obtain damages in overcrowding cases, and, for that reason, had no trouble waiving damages for such collective claims.[1]

---

[1] The motions panel's error is also clear from the face of its July 11, 1985, order. Whereas the motions panel seemed to hold that the only claims waived were those that fell within

(Continued on following page)

This is so regardless whether the *Spear* case was brought as a damages action. For it is a hallmark of the rule of *res judicata* that settlement of comprehensive litigation such as *Spear* precludes further litigation of any demand that might have been sustained under the cause of action. *See Nevada v. United States,* 463 U.S. 110, 129-31 & n.12 (1983) (citing *Restatement (Second) of Judgments* § 24 (1982)). The cause of action here, as in *Spear,* was principally for prison overcrowding at the Oahu Community Correctional Center. The consent decree provisions relating to population levels are the most detailed in the decree, and, if they can be enforced under *Washington v. Penwell,* 700 F.2d 570 (9th Cir. 1983), represent enormous concessions on the part of the State. *See* Consent Decree Part II. It is apparent that the claims for crowding in this case were "related in time, space, origin, or motivation," *Nevada v. United States, supra,* to the *Spear* facts, and would have been tried to the *Spear* trier of fact had *Spear* gone to trial. The panel should never have reached the merits here.

(Continued from previous page)

both clauses of the second sentence of the consent decree's waiver provision, in its order the motions panel went beyond the plain language of those clauses to hold that claims for "injunctive *and* declaratory relief are moot." *Id.* (emphasis added). The motions panel itself thus recognized that the waiver provisions demanded interpretation; on that finding, however, the case should have been remanded to the lower court.

Indeed, the appellants were of the view that the consent decree presented sufficiently substantial issues to warrant serious consideration whether to dismiss the appeal *themselves. See* the uncontested Affidavit of Glenn S. Grayson ¶ 2, No. 84-1538 (9th Cir. Jan. 12, 1987) (stating that counsel for plaintiffs admitted that plaintiffs were "seriously considering dismissing this appeal because the issues on appeal may be rendered moot by the consent decree entered into in *Spear*").

At the very least, the motions panel, as the United States Supreme Court routinely does when it appears that there is no controversy on appeal, *see, e.g., Town of Lockport v. Citizens for Community Action*, 431 U.S. 259, 263, 264 n.9 (1977); *Ellis v. Dyson*, 421 U.S. 426, 435 (1975), should have remanded the case to the District Court so that *that* Court could make trial findings bearing on the waiver clause in the *Spear* consent decree. Surely, given the reasonableness of our view of the consent decree, that would be the result if the District Court in the first instance had rendered a summary judgment to the plaintiffs rejecting a defense of *res judicata*. *See National Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983) (quoting *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981)); *cf. A & A Concrete v. White Mountain Apache Tribe*, 781 F.2d 1411, 1414 (9th Cir. 1986) (*res judicata* is a "mixed question of law *and fact*") (emphasis added). The result should be no different here when the ground for bar was not available until the case was on appeal and we pleaded settlement nine *days* after its entry in the lower court. *See Maryland v. United States*, 381 U.S. 41, 53 n.38 (1965).

For the foregoing reasons, rehearing or *en banc* review should be granted to correct the fundamental misreading of the *Spear* consent decree, which generates a windfall to the *Spear* plaintiffs, usurps the factfinding province of the District Courts, and portends extraordinary hardship to the State of Hawaii as it seeks to operate its prisons in accordance with constitutional principles and an ongoing consent judgment.

D. Rehearing or En Banc Review Should Be Granted To Amend that Part of the Panel Decision That Holds, Contrary to Numerous Circuit Decisions, and Recent Supreme Court Authority, that Attorneys Fees Can Be Had at this Stage.

A third and independent ground for rehearing or *en banc* review arises from the panel decision authorizing appellants' counsel immediately to "move for attorneys' fees and costs pursuant to 42 U.S.C. § 1988." Slip op. at 4. Even if all our other claims on rehearing are denied, rehearing should be granted, and this part of the decision amended, to make clear that no attorneys fees may be awarded until appellants "receive at least some relief on the merits of [their] claim." *Hewitt v. Helms*, 55 U.S.L.W. 4908, 4909 (U.S. June 19, 1987) (citing *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980)). To the degree the panel decision holds to the contrary, it is in plain conflict with *Hewitt* and *Hanrahan*, as well as many cases in this Circuit. *See Jensen v. City of San Jose*, 806 F.2d 899, 901 (9th Cir. 1986) (en banc) (citing, *e.g.*, *Escobar Ruiz v. I.N.S.*, 797 F.2d 1294 (9th Cir. 1986); *Ward v. County of San Diego*, 791 F.2d 1239 (9th Cir. 1986); *United States v. 2.61 Acres of Land*, 791 F.2d 666 (9th Cir. 1985)). To the degree decisions such as *Mantolete v. Bolger*, 791 F.2d 784 (9th Cir. 1986), in any way support appellants, we respectfully suggest they have been overruled by *Hewitt v. Helms*, *supra*.

III. CONCLUSION

For the reasons above, defendants-appellees urge that rehearing or en banc review be granted. On rehearing, the Court should affirm the judgment below, or, in the alternative, remand the case for proceedings to determine if plaintiffs' claims for monetary relief have been waived,

and those defenses preserved by the panel decisions. In addition, the ruling that plaintiffs may seek attorneys fees should be vacated in light of *Hewitt v. Helms*, No. 85-1630 (June 19, 1987).

Dated: Honolulu, Hawaii, July 3, 1987.

WARREN PRICE, III
Attorney General
State of Hawaii

/s/ STEVEN S. MICHAELS
GLENN S. GRAYSON
STEVEN S. MICHAELS
Deputy Attorneys General
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were duly served upon the following by depositing the same in the United States mails, first class postage prepaid, on July 3, 1987, addressed as follows:

Emmet Akao
2199 Kamehameha Highway
Honolulu, Hawaii 96819

Charles R. Breyer
William H. Orrick, III
Thomas J. Eicher
Coblentz, Cahen, McCabe & Breyer
One Embarcadero Center
Thirty-Fifth Floor
San Francisco, California 94111

(Attorneys for Appellants)

Dated: Honolulu, Hawaii, July 3, 1987.

/s/ Steven S. Michaels
Deputy Attorney General

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EMMET AKAO, ALLEN V. TRIPP,
AND GARRICK UMIAMAKA,

Plaintiffs-Appellants,

v.

EDWIN T. SHIMODA, et al.,

Defendants-Appellees

No. 84-1538

DC #83-1067-SPK

Hawaii (Honolulu)

ANSWER TO PETITION FOR REHEARING AND
SUGGESTION OF THE APPROPRIATENESS OF
REHEARING EN BANC

ADDENDUM

DECLARATION OF COUNSEL

FILED

AUGUST 24, 1987

CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

CHARLES R. BREYER
WILLIAM H. ORRICK, III
COBLENTZ, CAHEN, McCABE & BREYER
One Embarcadero Center
Thirty-Fifth Floor
San Francisco, California 94111
Telephone (415) 391-4800

Attorneys for Plaintiffs-Appellants

INTRODUCTION

On October 7, 1983, three inmates at the Oahu Community Correctional Center filed a complaint in the United States District Court, District of Hawaii, alleging pursuant to 42 U.S.C. § 1983 that they were injured by overcrowded conditions which had increased stress, tension, communicable diseases and violence among prisoners. (Complaint, ¶ 12.) Defendants, prison officials, moved to dismiss for failure to state a claim, and the District Court granted their motion without allowing plaintiffs the opportunity to amend. This Court reversed, observing that although plaintiffs' allegations were not sufficiently specific to state a cause of action, it was not "beyond doubt" that they could do so by amendment. *Akao v. Shimoda,* No. 84-1538, slip op. at 3 (9th Cir. June 19, 1987) [hereinafter "the Opinion"].

Having lost the appeal, defendants raise for the first time the issue of whether sovereign or qualified immunity forecloses plaintiffs' claims in their Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc.* Defendants' arguments are simultaneously too late and premature. The rule that this court will generally not consider an issue raised for the first time on appeal, *Bolker v. Commissioner,* 760 F.2d 1039, 1042 (9th Cir.

---

* Defendants have not argued that the Opinion directly conflicts with an existing opinion by another court of appeals or substantially affects a rule of national application in which there is an overriding need for national uniformity, nor advanced any other reason why a rehearing en banc is appropriate in this case concerning pleading requirements for *pro se* plaintiffs. *See* Rule 35(a), Federal Rules of Appellate Procedure and Rule 12, Rules of the United States Court of Appeals for the Ninth Circuit.

1985), applies with special force to issues raised for the first time in a petition for rehearing. Further, for four years defendants have argued that plaintiffs' claims are too vague. The facts needed to adjudicate defendants' immunity defenses have neither been pleaded nor been subject to discovery. Until a complaint which states a claim for relief is on file, there is no record on which to make a determination regarding immunity.

Defendants also contend that plaintiffs' claims are moot because of a consent decree in *Spear v. Ariyoshi*, No. 84-1104 (D. Haw. June 12, 1985), a class action concerning prison conditions in Hawaii. The language on which defendants rely, however, clearly permits plaintiffs to litigate their individual claims for damages. As a result, the Court should deny defendants' petition and permit plaintiffs to amend their complaint.*

ARGUMENT

I

WELL ESTABLISHED AUTHORITY IN THIS CIRCUIT REQUIRES THAT PLAINTIFFS BE PERMITTED TO AMEND THEIR COMPLAINT

It has long been the rule in this Circuit that *pro se* plaintiffs in civil rights actions who are confined in prison should be granted the opportunity to amend their complaints before dismissal for failure to state a claim unless it clearly appears from the complaint that the deficiency

---

*Defendants have also urged that plaintiffs are not entitled to attorneys' fees merely because they prevailed on appeal. The Opinion, while preserving plaintiffs' right to pursue their claim, does not provide relief on the merits. Accordingly, plaintiffs agree that they are not entitled to attorneys' fees at this time.

cannot be overcome. *Potter v. McCall*, 433 F.2d 1087 (9th Cir. 1970); *Armstrong v. Rushing*, 352 F.2d 836 (9th Cir. 1965). As Judge Duniway wrote in *Harmon v. Superior Court*, 307 F.2d 796, 798 (9th Cir. 1962):

> The claim may be, as appellees assert, entirely spurious. The complaint may well not state a claim upon which relief can be granted. It may be that appellant cannot amend to state such a claim. But those are not the questions before us. The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot. . . . The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify bypassing that right.

The Opinion is consistent with this authority. It is not "beyond doubt" that plaintiffs cannot state a claim. Opinion at 3. It is not "beyond doubt" that defendants are not immune from suit. At this stage of the case, the only issue is whether plaintiffs should have been granted the opportunity to amend their complaint. The Court properly decided that they should. Issues of standing, immunity and inability to state a claim must wait until plaintiffs revise their complaint.

II.

DEFENDANTS' ARGUMENT REGARDING IMMUNITY IS UNTIMELY

Defendants now contend for the first time that this Court should determine that they are either totally immune from suit under the Eleventh Amendment to the United

States Constitution, *Welch v. Department of Highways*, 55 U.S.L.W. 547 (U.S. June 25, 1987), or that their qualified immunity from suit in their individual capacities requires the same result. *Anderson v. Creighton*, 55 U.S.L.W. 5092 (U.S. June 25, 1987) Each argument rests on defendants' hypothesis of what plaintiffs will allege when they amend the complaint. Neither argument is ripe until the amendment has been made.

This Court will generally not consilder an issue raised for the first time on appeal, much less in a petition for rehearing. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). Three exceptions to that rule exist:

> [1] in an "exceptional" case when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, [2] when a new issue arises while appeal is pending because of a change in law, or [3] when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

Id. (Citations omitted.) None of the exceptions apply.

Defendants do not contend that the first exception exists here. There is nothing exceptional about the Court's determination that a *pro se* plaintiff should have the opportunity to amend his complaint before its dismissal. Nor have any new issues arisen because of a change in law while this appeal has been pending. Although defendants rely on two cases decided by the United States Supreme Court this June, *Welch v. Department of Highways* and *Anderson v. Creighton*, neither changed the law concerning the immunity which defendants seek in this action. *See*

Hans v. Louisiana, 134 U.S. 1 (1890) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

Finally, there are no facts alleged, much less developed, on which the Court can base an analysis of the immunity questions raised by defendants. Defendants assert (erroneously) that *Welch*, which concerned the application of § 33 of the Jones Act, 46 U.S.C. § 688, stands for the blanket proposition that "the lower federal courts must assume that damages in official capacity actions against state officials, by state citizens, in actions under 42 U.S.C. § 1983, are barred." Petition for Rehearing at 8. Before addressing that contention, the trial court must first determine whether the complaint is brought solely against defendants in their official capacities (which it almost assuredly is not). Then it must consider whether the State has waived its immunity and consented to suit in federal court. *Welch*, 55 U.S.L.W.. at 5048. Plaintiffs are entitled to establish through discovery that such a waiver occurred by means of the consent decree in *Spear v. Ariyoshi*, No. 84-1104 (D.Haw. June 12, 1985) or by other conduct. Until these preliminary questions are resolved through pleadings and discovery, there is no basis on which to adjudicate defendants' sovereign immunity defense.

There is even greater need for factual development regarding defendants' assertion that their qualified immunity for official action immunizes them from suit in their individual capacities.

> [W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow* [*v. Fitzgerald* 457 U.S. 800, 819 (1982)], assessed in light of the legal

> rules that were 'clearly established' at the time it was taken. *Id.*, at 818.

Anderson v. Creighton, 55 U.S.L.W. at 5093. The determination necessary under *Harlow v. Fitzgerald* depends on what the allegedly unlawful official action is, which has yet to be pleaded. Until it is, it is impossible to know whether the "clearly established" legal rules at the time render defendants liable for plaintiffs' claims.

Defendants contend that their duties to plaintiffs under the Eighth Amendment could not have been so clearly established that a reasonable official would understand that what they did violated plaintiffs' rights because *Toussain v. Yockey*, 722 F.2d 1490 (9th Cir. 1985), cited in the Opinion, was decided after plaintiffs' case was filed. That is nonsense. Claims arising under 42 U.S.C. § 1983 for violations of the eighth Amendment did not originate with *Toussaint v. Yockey*. As demonstrated in the Supplemental Opening Brief of Appellants, each of the effects of overcrowding alleged by plaintiffs forms the basis of an Eighth Amendment violation and did so at the time the complaint was filed: inadequate shelter and sanitation, *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982); increased violence, *id.*; and injury to mental well being, *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979). *See* Supplemental Opening Brief of Appellants at 6-13, *Akao v. Shimoda*.

Whether plaintiffs will be able to state a claim upon which relief can be granted under 42 U.S.C. § 1983 remains to be seen. So does the extent of the defendants' involvement. If plaintiffs allege conditions of the severity of the Arkansas prison system in *Hutto v. Finney*, 437 U.S. 678

(1978), for example, and state how they were personally injured as a result of those conditions, they will be entitled to relief. Until they have had an opportunity to clarify their complaint, it is premature for the Court to consider defendants' immunity defenses.

The irony of defendants' argument should not escape the Court. In their prior briefs, defendants complained that they did not know what the increase in stress, tension, communicable diseases, and the high increase in confrontations between inmates (Complaint, ¶ 12) alleged by plaintiffs meant in terms of 42 U.S.C. § 1983. They could not tell, they argued, whether plaintiffs had been injured by the conditions alleged. Now, without knowing how plaintiffs were injured or why plaintiffs claim defendants were responsible for those injuries, defendants assert that they are immune. While defendants could ultimately be proven correct, they must wait until plaintiffs amend their complaint to find out. Plaintiffs will have to describe adequately the roles which the defendants played in causing their injuries in order to state a claim. If they cannot, the trial court may dismiss their case. If plaintiffs state a claim, defendants may adjudicate the immunity issues on summary judgment. Now, without any record on which to base a decision, is not the time to make that determination.

III.

PLAINTIFFS' DAMAGE CLAIMS WERE NOT SETTLED BY THE SPEAR v. ARIYOSHI CONSENT DECREE.

Defendants also argue that the motions panel erred in determining that plaintiffs' claims are moot. Their

curious argument relies on the following waiver clause, contained in a consent decree which settled *Spear v. Ariyoshi*, No. 84-1104 (D.Haw. June 12, 1985), a class action regarding unconstitutional conditions which existed in the Hawaii state prison system:

> N. By entering into this decree, plaintiffs and members of the plaintiff class are not waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief. The only claims against defendants settled herein are claims for injunctive relief of a general nature as detailed in the complaint filed in this case and which are applicable to more than the individual circumstances of a particular plaintiff class member.

Id. at 6.

Defendants badly misinterpret the waiver clause. Plaintiffs did not waive any claims for monetary relief: "members of the plaintiff class are *not* waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief." *Id.;* emphasis supplied. That sentence is modified to explain that claims for injunctive relief of a general nature are waived: "The *only* claims against defendants settled herein are *claims for injunctive relief of a general nature* as detailed in the complaint filed in this case. . . ." *Id.;* emphasis supplied. The final clause of the second sentence describes more particularly what "claims for injunctive relief of a general nature as detailed in the complaint" means—claims which are ap-

plicable to more than the individual circumstances of a particular plaintiff class member." *Id.**

The proper interpretation of the waiver clause, as the motions panel found, is that plaintiffs are precluded from bringing an individual action for injunctive relief based on overcrowding in their prison. They are not precluded, however, from bringing an individual action based on overcrowding if they suffered a compensable injury as a result of the overcrowding. If defendants' interpretation was correct, the consent decree would preclude virtually every individual action pursuant to 42 U.S.C. § 1983 arising in the Hawaii state prison system. One could not complain about violence caused by overcrowding, even if he suffered a broken leg in a fight caused by it, or seek to recover from stress caused by overcrowding, even if he suffered a nervous breakdown as a result. Neither the language of the waiver clause nor its intent would allow such a result.

The meaning of the waiver clause is clear. The motions panel correctly determined that plaintiffs' damages action could proceed. That determination should not be disturbed.

—o—

* Defendants' assertion that plaintiffs considered dismissing their appeal because of the effect of the consent decree is a half truth. Plaintiffs' *pro bono* counsel learned of the consent decree's existence, but had not received a copy of it, at the time of the conversation described in the Grayson affidavit. We were unaware of the motions' panel's ruling, since it was not produced as part of the record we received upon our appointment as *pro bono* counsel. Once we received the consent decree, it was obvious that plaintiffs' claims were not moot and we so informed defendants' counsel. *See* Declaration of William H. Orrick, III, which is appended hereto.

CONCLUSION

The Court's Opinion should be amended to delete its last sentence, as plaintiffs do not seek attorneys' fees at this time. Otherwise, the Court should deny defendants' petition.

DATED: August 23, 1987

Respectfully submitted,

COBLENTZ, CAHEN, McCABE
& BREYER
By /s/ William H. Orrick, III
William H. Orrick, III
Attorneys for
Plaintiffs-Appellants

ADDENDUM

DECLARATION OF COUNSEL

I, William H. Orrick, III, declare:

1. I am *pro bono* counsel for plaintiffs in the above-referenced matter, admitted to practice before this Court, and an associate with the law firm of Coblentz, Cahen, McCabe & Breyer. I have personal knowledge of the matters stated herein and, if called upon to do so, I would and could competently testify to the following facts.

2. In the Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc, defendants refer to a conversation in December, 1986, between their counsel, Glenn Grayson, and Thomas Eicher, a former associate of our law firm who was initially appointed as

pro bono counsel in this action. I suggested that Mr. Eicher speak with Mr. Grayson at that time because we had recently discovered the existence of the consent decree in *Spear v. Ariyoshi,* No. 84-1104 (D. Haw. June 12, 1985). We had not yet obtained a copy of it, but as a matter of courtesy did not want Mr. Grayson to spend time responding to our opening brief if we would ultimately have to abandon the appeal. Once we received and reviewed the consent decree, however, it was clear that plaintiffs' individual claims for damages were not moot, and we so notified the defendants.

3. As we were not counsel of record for plaintiffs until September 30, 1986, we did not receive the Order of the motions panel of July 11, 1985. (Indeed, I did not see that Order until defendants filed the Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc.) Obviously it is my belief that the motions panel correctly interpreted the consent decree, and we would not have contacted Mr. Grayson in December 1986 if we had been aware of the Order.

I declare under penalty of perjury that the foregoing is true and correct and that it was executed in San Francisco, California, on August 23, 1987.

/s/ William H. Orrick, III
William H. Orrick, III

Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1343

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

EDWIN T. SHIMODA, Administrator, Oahu Community Correctional Center, and MICHAEL KAKESAKO, Corrections Division Administrator,

Petitioners,

vs.

EMMET AKAO, ALLEN V. TRIPP, AND GARRICK UMIAMAKA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Charles R. Breyer
William H. Orrick, III
Coblentz, Cahen, McCabe & Breyer
One Embarcadero Center
35th Floor
San Francisco, California 94111
Telephone: (415) 391-4800

Counsel for Respondents

15pp

NTZ, CAHEN,
E & BREYER
NEYS AT LAW
ROUP INCLUDING
NAL CORPORATIONS
NORTH FLOOR
ADERO CENTER
ISCO, CA 94111

QUESTION PRESENTED

Whether the incarcerated pro se plaintiffs in this civil rights action should be granted the opportunity to amend their complaint before dismissal for failure to state a claim.

LENTZ, CAHEN,
ABE & BREYER
ORNEYS AT LAW
NERSHIP INCLUDING
IONAL CORPORATIONS
TY-FIFTH FLOOR
ARCADERO CENTER
NCISCO, CA 94111

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NTZ, CAHEN,
E & BREYER
NEYS AT LAW
RSHIP INCLUDING
NAL CORPORATIONS
-FIFTH FLOOR
ACADERO CENTER
CISCO, CA 94111

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E & BREYER
NEYS AT LAW
NSHIP INCLUDING
AL CORPORATIONS
FIFTH FLOOR
CADERO CENTER
ISCO, CA 94111

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ITZ, CAHEN,
& BREYER
NEYS AT LAW
NERSHIP INCLUDING
AL CORPORATIONS
FIFTH FLOOR
EADERO CENTER
ISCO, CA 94111

Respondents Emmet Akao, Allen V. Tripp and Garrik Umiamaka respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 832 F.2d 19 (1987), amending 820 F.2d 302 (1987).

STATEMENT OF THE CASE

This unremarkable case concerns the United States District Court for the District of Hawaii's dismissal of the pro se complaint of three inmates at the Oahu Community Correctional Center, who had alleged pursuant to 42 U.S.C. §1983 that they were injured because overcrowded conditions at the prison had increased stress, tension, communicable diseases and violence among prisoners. In granting petitioners' motion to dismiss pursuant to Rule 12(b)(6) of Federal Rules of Civil Procedure, the District Court neither allowed respondents to amend their complaint (Pet., 7a-9a) nor to appear at the hearing to explain their claims. (App. 1a) The United States Court of Appeals for the Ninth Circuit reversed, observing that although plaintiffs' allegations were not sufficiently specific to state a cause of action, it was not "beyond doubt" that they could do so by amendment. (Pet., 3a)

That is all this case is about. Petitioners describe in great detail in their Statement of the Case the problems the State of Hawaii has in managing its prison system, but those difficulties were not part of the record before the United States

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& BREYER
EYS AT LAW
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L CORPORATIONS
FIFTH FLOOR
ADERO CENTER
SCO, CA 9411

District Judge when he dismissed plaintiffs' case, and they were not before the Ninth Circuit (Judges Wallace, Wiggins and Kennedy) when it reversed the trial court's decision. Neither were arguments concerning immunity, which petitioners first raised after the Ninth Circuit decided the appeal.

In sum, the sole issue before this Court is whether respondents should be allowed to amend their complaint. As it is not beyond doubt that they can state a claim for relief, the Court should deny the writ.

REASONS FOR DENYING THE WRIT

1. THIS IS A PLEADING CASE WHICH WAS PROPERLY DECIDED

The decision below was correct. Dismissal for failure to state a claim is rarely proper. United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). This is particularly true when a plaintiff proceeds pro se:

> As the Court unanimously held in Haines v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct.594 (1972) a pro se complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Id. at 520-521, 30 L.Ed.2d 652, 92 S.Ct.594, quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 78 S.Ct.99 (1957).

Estelle v. Gamble, 429 U.S. 97, 106 (1976).

The Ninth Circuit followed Estelle v. Gamble. Respondents had alleged that they were injured by overcrowded conditions

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E & BREYER
NEYS AT LAW
NSHIP INCLUDING
AL CORPORATIONS
FIFTH FLOOR
CADERO CENTER
ISCO, CA 94111

which had increased stress, tension, communicable diseases and violence among prisoners. (Pet., 19a) The Ninth Circuit held:

> It is true that the prisoners' allegations are not sufficiently specific and do not allege that they personally have suffered cruel or inhuman punishment, but we cannot hold that it is "beyond doubt" that they could not do so.

(Pet., 3a) The Ninth Circuit accordingly reversed, and allowed respondents the opportunity to amend their complaint. That decision should not be disturbed.

2. THE DECISION BELOW DID NOT REACH THE IMMUNITY QUESTIONS RAISED IN THIS COURT BY PETITIONERS

The Ninth Circuit's decision did not hold, implicitly or explicitly, that the petitioners are or are not entitled to immunity. This is a pleading case, and all the Ninth Circuit decided was that the plaintiffs were entitled to a second chance to state a claim. The decision, accordingly, does not directly or indirectly conflict with the decisions of this Court regarding the qualified immunity doctrine or the Eleventh Amendment. Those questions cannot be reached until a pleading which states a claim is filed.

Under the qualified immunity principles reaffirmed in Anderson v. Creighton, 107 S.Ct. 3034 (1987), the rights petitioners are alleged to have violated must have been "clearly established," or be "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 107 S.Ct. at 3039. Petitioners

NTZ, CAHEN,
E & BREYER
NEYS AT LAW
ERSHIP INCLUDING
NAL CORPORATIONS
-FIFTH FLOOR
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contend under Anderson that they are entitled to immunity because overcrowding, alone, is not a constitutional violation and because the Court of Appeals' relied on Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984), a case which was decided after plaintiffs' case was filed. Each argument is spurious.

As a threshold matter, there are simply no facts alleged, much less developed, on which the Court can base an analysis of the immunity questions raised by petitioners. Whether a defendant is entitled to qualified immunity depends on what the allegedly unlawful official action is, which the Ninth Circuit found that respondents had not pled with sufficient specificity. Until it is so pled, and petitioners' conduct fleshed out in discovery, it is impossible to know whether the "clearly established" legal rules at the time render petitioners liable for respondents' claims.

Further, while overcrowding is not a constitutional violation, injuries suffered as a result of overcrowding violate the Eighth Amendment if they "deprive inmates of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). If the level of shelter and sanitation, increased violence, and injury to mental health caused by overcrowding injured respondents and deprived them of the minimal civilized measure of life's necessities, then they may state a claim and obtain relief. See, e.g., Hutto v. Finney, 437 U.S. 678 (1978). Thus, petitioners' reliance on Union County Jail Inmates v. DiBuono, 713 F.2d 984 (3rd Cir. 1983) which considers

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claims based on overcrowding but not its effect, and the space allotted to inmates in Toussaint v. Yockey, is misplaced. It is the effect of overcrowding--not comparisons of the space in which inmates are housed--which a court must consider in determining whether a constitutional violation exists.

Nor did claims arising under 42 U.S.C. §1983 for violations of the Eighth Amendment originate with Toussaint v. Yockey. Each of the effects of overcrowding alleged by plaintiffs formed the basis of an Eighth Amendment violation at the time the complaint was filed: inadequate shelter and sanitation, e.g., Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982); increased violence, id.; and injury to mental well being, e.g., Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979). Whether petitioners violated clearly-established law depends on the facts ultimately pled and proved, not on the Ninth Circuit's citation of a case decided after the filing of respondents' complaint.

Petitioners also assert that the Court should rule on their immunity defenses now because such questions should be resolved "at the earliest possible stage of litigation." Anderson v. Creighton, 107 S.Ct. at 3042. Before respondents have stated a claim, however, it is impossible to consider the immunity questions. In Anderson v. Creighton, the trial court reached the immunity question on summary judgment. Here, petitioners did not even raise their immunity defenses in the trial court. Due process requires that respondents be allowed to

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state their claim and to introduce evidence in opposition to a properly noticed motion to establish that qualified immunity does not shield petitioners.

Finally, petitioners argue that if this action is brought against them in their official capacities, it is barred by the Eleventh Amendment. Before addressing that contention, the trial court must first determine whether the complaint is brought against defendants solely in their official capacities (which it almost assuredly is not). Then it must consider whether the State has waived its immunity and consented to suit in federal court. Welch v. Dept. of Highways & Public Trahsp., 107 S.Ct. 2941, 2946 (1987). Respondents are entitled to establish through discovery that such a waiver occurred by means of the consent decree in Spear v. Ariyoshi, No. 84-1104 (D.Haw. June 12, 1985) or by other conduct. Until these preliminary questions are resolved through pleadings and discovery, however, there is no basis on which to adjudicate petitioners' sovereign immunity defense.

3. RESPONDENTS' DAMAGES CLAIMS WERE NOT PRECLUDED IN THE SPEAR V. ARIYOSHI CONSENT DECREE.

Petitioners also claim that respondents, as class members in Spear v. Ariyoshi, No. 84-1108 (D.Haw. filed June 12, 1985), waived their claims for monetary damages in a consent decree which settled a class action regarding unconstitutional conditions which existed in the Hawaii state prison system.

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While this is an issue of little moment for this Court, the Ninth Circuit's interpretation of the waiver clause was correct and cert should not be granted to review it.

The waiver clause in the consent decree states in full:

> N. By entering into this decree, plaintiffs and members of the plaintiff class are not waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief. The only claims against defendants settled herein are claims for injunctive relief of a general nature as detailed in the complaint filed in this case and which are applicable to more than the individual circumstances of a particular plaintiff class member.

(Pet., 39a, 40a) The clause is unambiguous. Responents did not waive any claims for monetary relief.

The first sentence describes claims which are not waived. "Members of the plaintiff class are not waiving any rights to pursue individual claims for declaratory, injunctive, and/or monetary relief." Id.; emphasis supplied. The second sentence describes claims which are waived: "The only claims against defendants settled herein are claims for injunctive relief of a general nature . . . ." Id.; emphasis supplied. Claims "detailed in the complaint" and "claims which are applicable to more than the individual circumstances of a particular plaintiff class member" modify and define more particularly the claims for injunctive relief which have been waived. Id.

The proper interpretation of the waiver clause, as the motions panel for the Ninth Circuit found, is that respondents are precluded from bringing an individual action for injunctive

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relief based on the effects of overcrowding in their prison. (Pet., 5a) They are not precluded, however, from bringing an individual action concerning overcrowding if they suffered a compensable injury as a result of the overcrowding. The consent decree does not preclude every individual action pursuant to 42 U.S.C. §1983 arising in the Hawaii state prison system, as petitioners would contend. Neither the language of the waiver clause nor its intent allows such a result.[1]

The meaning of the waiver clause is clear. The motions panel correctly determined that plaintiffs' damages action could proceed. That determination should not be disturbed.

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[1] Respondents repeat a misleading half truth when they assert that petitioners considered dismissing their appeal because of the effect of the consent decree. When respondents' attorneys were appointed pro bono counsel on September 30, 1986, we did not receive the appellate record and were unaware of the consent decree, petitioner's mootness argument, or the motions' panel's decision. Out of courtesy to petitioners, respondents extended petitioners' time to file a responding brief in the Court of Appeals when we learned of the existence of the consent decree and petitioners' mootness argument. (Pet., 82a) After obtaining a copy of the decree, however, we told petitioners to proceed with their briefing since it was obvious that respondents' claims were not mooted by the consent decree. Id.

Z. CAHEN,
L. BREYER
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DERO CENTER
CO, CA 94111

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

COBLENTZ, CAHEN, McCABE & BREYER

By _____
Charles R. Breyer
William H. Orrick, III
Attorneys for Respondents

LENTZ, CAHEN,
ABE & BREYER
RNEYS AT LAW
NERSHIP INCLUDING
SIONAL CORPORATIONS
TY-FIFTH FLOOR
BARCADERO CENTER
NCISCO, CA 94111

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EMMET AKAO, ALLEN TRIPP, GARRICK UMIAMAKA, Plaintiffs,	)	CIVIL NO. 83-1067
vs.	)	
MICHAEL KAKESAKO, Defendant.	)	

FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII

DEC 19 1983

at 8 o'clock and 05 min. P.M.

WALTER A. Y. H. CHINN, CLERK

ORDER REGARDING PLAINTIFFS' REQUEST TO APPEAR AT ORAL ARGUMENT

Insofar as the court has determined that oral argument will not be required for the defendant's Motion to Dismiss originally scheduled for hearing on December 27, 1983, the plaintiffs' request to appear at such hearing is DENIED. The court will consider plaintiffs' request to appear at later proceedings on an individual basis, as the matters arise.

SO ORDERED.

DATED: Honolulu, Hawaii, DEC 16 1983

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWIN T. SHIMODA, *Administrator, Oahu Community Correctional Center*, and MICHAEL KAKESAKO, *Corrections Division Administrator*,

Petitioners,

v.

EMMET AKAO, ALLEN V. TRIPP, and GARRICK UMIAMAKA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

WARREN PRICE, III
Attorney General
State of Hawaii

CORINNE K.A. WATANABE*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1343

EDWIN T. SHIMODA, *Administrator, Oahu Community Correctional Center*, and MICHAEL KAKESAKO, *Corrections Division Administrator*,

Petitioners,

v.

EMMET AKAO, ALLEN V. TRIPP, and GARRICK UMIAMAKA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

ARGUMENT

Our petition shows that the lower court's decision, which on the basis of "intervening" law permits litigation of damage claims charging that the Eighth Amendment is breached by any changes to prison population levels causing "increase in stress, tension, communicable diseases, and a high increase in confrontrations between inmates,"[1] is in conflict with the doctrine of objective qualified immunity (Pet. 13-16), the Eleventh Amendment (*id.* 17-18), and the intent of the consent decree settling the identical charges at issue here (*id.* 18-22).

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[1] Complaint ¶ 12, No. 83-1067 (D. Haw. Oct. 7, 1983), Pet. App. 19, *quoted*, 820 F.2d 302 (9th Cir. 1987), Pet. App. 2.

Respondents' opposition nowhere asserts that the recurring and substantial questions presented lack sufficient import to merit review. Indeed, it is precisely because, in respondents' words, this case is "unremarkable" (Resp. Br. 1), that review is warranted. Overcrowded prisons are not uncommon, and, if the reasoning below is permitted to stand, those who administer prisons across the Nation will be burdened with the threat of personal liability for any adverse "effect of overcrowding" (*id.* 5) whenever facilities they manage experience (usually due to factors beyond their control) a rise in inmate population.

It will be equally commonplace, if respondents prevail, that States, rather than enjoying the "jurisdictional" protection of the Eleventh Amendment, will be snarled in intensive fact-litigation over their liability in federal court, whenever a litigant asserts immunity is waived by "conduct" (*id.* 6).

Nor would it be surprising, if review is denied, if State officials' efforts to settle prison disputes through progressive devices such as the consent decree in *Spear v. Ariyoshi* come to a halt. When officials realize that, even if inmates consent to such measures as triple-celling, and waive claims for damages "applicable to more than the individual circumstances of a particular plaintiff class member," the case can be tried over as an "individual action concerning overcrowding" (Resp. Br. 8), settlement will most assuredly be considered an unrealistic option, and the lower federal courts, just as surely, will be burdened with additional litigation in this sensitive area.

None of these novel results, which themselves counsel review, can be drawn out of this Court's decisions. Indeed, respondents' own brief vividly dem-

onstrates that the claim that the decision below "does not directly or indirectly conflict with the decisions of this Court" (*id.* 3) is plainly wrong.

I. The Decision Below is in Plain Conflict With the Decisions of this Court under the Qualified Immunity Doctrine and the Eleventh Amendment.

Respondents argue review should be denied because "[t]he Ninth Circuit's decision did not hold, implicitly or explicitly, that the petitioners are not entitled to immunity," and, thus, there is no conflict with this Court's decisions. (Resp. Br. 3). In their view, until "petitioners' conduct [is] fleshed out in discovery," immunity claims are premature (*id.* 4).[2]

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[2] Respondents' claim that review should be denied because immunity was not presented to the court of appeals until "after the Ninth Circuit decided the appeal" (Resp. Br. 2) is wrong on many fronts. First, petitioners' claim based on *Anderson v. Creighton*, 107 S. Ct. 3044 (1987), was not even available when the case was decided, particularly given Judge Canby's opinion in *Albers v. Whitley*, 743 F.2d 1372 (9th Cir. 1984), *rev'd on other grounds*, 475 U.S. 312 (1986). Second, petitioners, appellees below, are fully entitled to raise immunity here, since it was the obligation of the lower court, sitting in review of the judgment of the district court, to affirm "on any ground that finds support in the record." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 n.7 (1984); *see also Thigpen v. Roberts*, 468 U.S. 27, 30 (1984). Third, in any case our argument on the merits more than subsumed a *Harlow* immunity claim, insofar as it was, and remains, our view that respondents' claimed rights have not ever been "clearly established," let alone at the time petitioners allegedly acted in this case; *see also* appellees' Additional Citations, No. 84-1538 (9th Cir. Jul. 16, 1985) (citing, *e.g.*, *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982))).

With respect to the Eleventh Amendment, see *Alabama v. Pugh*, 438 U.S. 781, 782 n.1 (1978) (per curiam).

With respect to claims against petitioners in their individual capacities, the premise of respondents' argument—that the panel decision does not deny us the benefits of immunity—is contrary to every qualified immunity decision of this Court since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified, no less than absolute immunity, assures "that officials can act without fear of harassing litigation," *Davis v. Scherer*, 468 U.S. 183, 195 (1984), and bars not only "money damages," but "such pretrial matters as discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This protection for "all but the plainly incompetent," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), requires that defendants be "entitled to dismissal prior to discovery" if "the actions [the defendants are] allege[d] to have taken are actions that a reasonable officer could have believed lawful." *Anderson v. Creighton*, 107 S. Ct. 3034, 3042 n.6 (1987). In short, qualified immunity is an "entitlement not to have to answer for [one's] conduct in a civil damages action." *Mitchell*, 472 U.S. at 525 (citation omitted).

Although respondents suggest (Resp. Br. 5-6) that we have not been denied our rights under *Anderson* because, ostensibly, the case has simply been remanded so that respondents may "file an amendment" (Pet. App. 3), these claims are wholly illusory. It is established, both here, *see Foman v. Davis*, 371 U.S. 178, 182 (1963), and in the Ninth Circuit, *see Klamath Lake Pharmaceutical Assoc. v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1293 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983), that an amendment that would be futile under Rule 12 standards, *Conley v. Gibson*, 355 U.S. 41 (1957); *Estelle v. Gamble*, 429 U.S. 97 (1976), must be denied. Unless the panel de-

cision is error under *Foman* and *Klamath*, the panel's ruling that the district court's failure to grant amendment here was not only error, but plain error, necessarily implies petitioners may not prevail on immunity at the Rule 12 stage on remand. *Cf. United States v. Frady*, 456 U.S. 152, 163 n. 13 (1982) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)). Respondents, who assert that the order below entitles them to discovery on the merits (Resp. Br. at 4, 5, 6), confess our immunity claim is ripe. *If* respondents allege facts implicating the panel's expansion of *Toussaint*'s "intervening" standards (*see* Pet. 16), that is, if respondents claim that overcrowding "engenders violence, tension, and psychiatric problems" (Pet. App. 2), and cure the technical Article III defects in their complaint by alleging that "they personally have suffered" (*id.* 2-3), respondents will survive a motion to dismiss, immunity notwithstanding.[3]

The law of the case established by the panel is thus in direct conflict with the teaching of *Anderson v. Creighton*, 107 S. Ct. 3034 (1987). The panel's *only* reason for remanding was "the intervening *Toussaint* opinion" (Pet. App. 2), yet, under *Anderson*, further litigation ought to have been barred because officer's liability under 42 U.S.C. § 1983 must be predicated upon an official's knowing violation of "current American law." 107 S. Ct. at 3042. Respondents' effort (Resp. Br. 5) to buttress the panel analysis with citations to *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), and *Spain v. Procunier*, 600 F.2d 189 (9th Cir.

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[3] Thus, "the harm [we seek] to avoid—[the burden of answering the claims]—will occur regardless of the result on remand." *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 997 (1987).

1979), as demonstrated already (Pet. 14-16), is identical to the reasoning rejected in *Anderson*. Broad dicta that a prison must provide " 'adequate food, clothing shelter, sanitation, medical care, and personal safety,' " *Hoptowit*, 682 F.2d at 1246, or that a "court's judgment must be informed by current and enlightened scientific opinion as to the conditions necessary to insure good physical and mental health," *Spain*, 600 F.2d at 200, say no more about what specific conditions violate the prohibition on cruel and unusual punishments than does the general right "to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances" dictate that a search is "objectively legally unreasonable" simply because it breaches this "firmly established" rule. *Anderson*, 107 S. Ct. at 3039; *see also Mitchell*, 472 U.S. 530-35; *Davis*, 468 U.S. at 192 n.10.

When *Anderson* is applied faithfully, whether the "stress, tension, disease" and "confrontations" associated with multiple celling of inmates solely during sleeping hours in rooms with more than twenty-five square feet of floorspace per inmate implicated, at the time the complaint was filed, no "clearly established" law under the Eighth Amendment, even in the Ninth Circuit. *Hoptowit*, 682 F.2d at 1249 (out-of-cell time critical to Eighth Amendment inquiry); *Spain*, 600 F.2d at 200 (outdoor exercise required only if prisoners held in cells for all but one hour a day, five days a week, for more than four years). That is doubtless why the district judge in this very case dismissed respondents' claims on the merits (Pet. App. 7-9). Indeed, the conditions alleged here were quite arguably lawful under the "intervening *Tous-*

saint opinion." (Pet. App. 2; *see* Pet. 16). There is simply no way, properly applied, the qualified immunity doctrine would permit respondents to litigate their claims for damages against petitioners in their individual capacities. For this reason the writ should be granted. *See Anderson*, 107 S. Ct. at 3038-39; *Mitchell*, 472 U.S. at 535; *Davis*, 468 U.S. at 192 n.10; *see also Harlow*, 457 U.S. at 818 n.32.

Certiorari is even more warranted if, as respondents argue, the panel decision rests on the view that a claim that Hawaii has waived Eleventh Amendment immunity is amenable to discovery (Resp. Br. 6). Respondents' claim is refuted by the very case they cite, *Welch v. Department of Highways*, 107 S. Ct. 2941 (1987), which reaffirms that this Court "will find a waiver by the State 'only where stated "by the most express language or by such overwhelming implications from [a statutory] text as [will] leave no room for any other reasonable construction." ' " *Id.* at 2946 (plurality op.). Nowhere do *Welch* or the cases on which it relies suggest a consent decree, let alone one imposing only prospective relief, can ever be the basis of a waiver of the Eleventh Amendment for retroactive damage awards. *Cf. Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987) (Amendment may bar even prospective terms of consent decree).

The claim that the panel decision "does not directly or indirectly conflict with the decisions of this Court regarding the qualified immunity doctrine or the Eleventh Amendment" (Resp. Br. 3) is unfounded. The writ should be granted.

II. The Decision Below Holding the Decree in Spear v. Ariyoshi to be Without Any Effect on Damages Claims Merits Review.

The enduring irony of the panel decision is that the one issue on which a remand was in order—whether the parties' intent in settling claims "applicable to more than the individual circumstances of a particular class member" (Pet. App. 40) barred damages claims such as those here—was decided adversely to us as a matter of law, while the purely legal issues of officer's and Eleventh Amendment immunity were remanded for further review. Respondents' contentions in support of the panel's summary dismissal of the implications of *Spear v. Ariyoshi* prove that the only question that ought to have been "fleshed out in discovery" (Resp. Br. 4) is whether this case is moot.

Respondents' bold claim that the "waiver clause in the consent decree . . . is unambiguous" and that "[r]espondents did not waive *any* claims for monetary relief" (Resp. Br. 7) (emphasis added) reads significant parts of the clause out of the decree. The only claims expressly preserved by the clause are "*individual* claims for declaratory, injunctive, and/or monetary relief" (Pet. App. 40, quoted, Resp. Br. 7) not "all" claims for monetary relief. Contrary to respondents' representation (Resp. Br. 7-8), the second sentence of the waiver clause, which bars "claims for injunctive relief of a general nature as detailed in the complaint . . . and which are applicable to more than the individual circumstances of a particular plaintiff class member," *id.*, does not deal solely with "claims for injunctive relief." Indeed, the panel rejected respondents' view in holding that declaratory relief was also barred. *Cf. Colorado River Conserva-*

tion District v. United States, 424 U.S. 800, 816 (1976) (contrasting *Younger v. Harris*, 401 U.S. 37 (1971), with *Samuels v. Mackell*, 401 U.S. 66 (1971)). Thus, where, as here, inmates seek to litigate claims "applicable to more than the individual circumstances of a particular plaintiff class member," damages are barred and the inmate must resort to the decree's mediation remedies (Pet. App. 38). Indeed, nowhere do respondents offer any rejoinder to the claim that the consent decree is senseless if the very triple-celling to which respondents consented until December 15, 1987 (*see* Pet. i, 10) can be the basis of litigation and damages awards.

Although this Court properly may review the panel's failure correctly to effect a settlement of federal litigation involving numerous parties and matters of public concern, *e.g.*, *Nevada v. United States*, 463 U.S. 110 (1983), it is not necessary at this time that this Court deploy its resources to resolve finally the parties' dispute over the meaning of the consent decree. What we do ask, however, is that, given the plausibility of our position, the writ should be granted, the judgment vacated, and the case remanded to the district court for further consideration of whether the instant claims are moot. Such a disposition would effect the rules of summary process, *see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513-14 (1986); *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948), and Article III, *see, e.g.*, *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); *Ellis v. Dyson*, 421 U.S. 426, 435 (1975), that have long governed when, during the course of an appeal, it becomes distinctly possible that "there no longer is a

live controversy." *Deakins v. Monoghan*, 108 S. Ct. 523, 538 (1988).

CONCLUSION

For the reasons above and those presented in the petition for certiorari, the writ should be granted.

WARREN PRICE, III
Attorney General
State of Hawaii

CORINNE K.A. WATANABE*
First Deputy Attorney General
State of Hawaii
**Counsel of Record*

STEVEN S. MICHAELS
Deputy Attorney General
State of Hawaii

State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Counsel for Petitioners